95-431

(1)

Supreme Court, U.S.
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AUG 28 1995
CLERK

SUPREME COURT OF THE UNITED STATES

MARK A. TURNER
Petitioner,
vs.
GENERAL MOTORS CORPORAT ION

THE B.O.C GROUP

BUICK OLDSMOBILE CADILLAC GROUP

JEFF RINGER

Respondent

Petition for Writ of Certiorari to the Supreme Court of the United States

---

PETITION FOR WRIT OF CERTIORARI

MARK A. TURNER
15556 STOLTZ ROAD
DIAMOND, OHIO 44412216/538-0424 Counsel of Record

Mark A Turner

246 PP

QUESTIONS PRESENTED

1. Did the lower Courts improperly dismiss the Plaintiff's case even-though many genuine issues of material facts remain in dispute in the Plaintiff's opposition to summary judgment brief:

a: Did the lower Courts ignore a lengthy pattern of racial conduct alleged in the Plaintiff's complaint and the Defendant Company admitted to in discover

b: Was there an inappropriate overuse of discovery, the case was not managed in the differential case management system to the detriment of the Plaintiff's side of the case?

c: Did the lower Court judge David D. Dowd disregard the US Magistrate Streepy in-depth and accurate report and recommendation, act independently, go beyond and abuse his judicial authority and discretion by weighing the credibility of testimony, the validity of facts, drawing inferences, conclusions which is strictly the province of the jury and in doing so he bypass the jury systems function and acted autocratically rendering a decision, although the original complaint requested a jury demand.

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PARTIES TO THE PROCEEDING

The Petitioner, Mark A. Turner

15556 Stoltz Road

Diamond, Ohio 44412

THE RESPONDENT

1. GENERAL MOTORS CORPORATION

2. B.O.C. GROUP,

3. BUICK OLDSMOBILE CADIALLAC

4. JEFF RINGER

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A. 1. Magistrate Streepy report and recommendation order filed on 12/29/93 filed in US District Court in Cleveland, Case 91-CV-479

A. 2. Memorandum by Plaintiff in opposition to Defendant General Motor's motion for summary judgement filed on 7/6/93 proceeding no. 114 civil docket US District Court Northern District of Ohio

A-3. Memorandum Opinion
granting defendant's motion for summary judgement Judge D. Dowd US District Court Northern District of Ohio (Akron) filed on 2/10/94 proceeding no. 131 civil docket 91-CV479

A-4. Motion for rehearing and oral argument plaintiff Mark A. Turner filed in the US States Court of appeals for the sixth circuit case no. 94.3215

A-4 Original complaint ammended /4/22/1991 U.S. district court for the Northern district of Eastern Ohio, jury demand

A-5. Motion for rehearing and oral argument plaintiff Mark A. Turner filed in the US States Court of appeals for the sixth circuit case no. 94.3215 (omit)

JURISDICTION

On 6/9/95 THE U.S. COURT OF APPEALS FOR THE 6 CIRCUIT denied the appeal 94 3215,this Court has jurisdiction to reveiw the decision by writ of certiorari under 28 U.S.C.A. 1254-1

APPLICABLE STATUTORY PROVISIONS

I. This is a civil rights action to vindicate rights secured by Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e et seq) ; and chapter 4112 of the Ohio Revised Code. Jurisdiction is conferred upon this court by 42 U.S.C. Sections 2000e-(f) (3), 28 U.S.C. Sections 1331 and 1343, and its pendent jurisdiction.

IN THE STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 94-3215

Mark A. Turner,

Plaintiff-Appellant

v.

GENERAL MOTORS CORPORATION,

Defendant-Appellee

On the Appeal From the United States District Court From the Northern District of Ohio, Eastern Division (Case No. Y:91CV0479)

MOTION FOR REHEARING*AND ORAL ARGUMENT

Mark A. Turner
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et, al.,

I. A TRIAL BY JURY SHOULD BE MANDATORY In Judge Dowd's memorandum and opinion granting the Defendant's motion for summary judgement, his complete error was that he decided the validity and the facts regarding the case, this is the province of the jury, his only function at the summary judgement level is to discern are there any disputed facts regarding the law. In the appellant's brief virtually every point about fact and law were contested, this case should be argued before a jury weighing the testimony drawing inferences, judging the credibility of evidences and witnesses is the function of the jury system. Judge Dowd went beyond his judicial discretion and abused his authority

by rendering this erroneous decision, he autocratically by passed the jury system and arbitrary, independently scrutinized the facts of the case, although the Plaintiff requested a trial by jury in his original complaint, which is his constitutional right to have a jury of his peers.

SEGMENTS 1 PAGE 8^9 DOWDS STATEMENT

1 "-all that can be said is that the work environment was arguably very unpleasant"' 2 "hostile from the plaintiffs standpoint"

3"There is no evidence to support a racially hostile enviroment,based on three incidents"

4"There is nothing,except rules of etiquette"

5"The incidents which occurred at the job site were not motivated by racial animus"

ARGUMENT AT LAW

All these statements Judge Dowd is deliberately weighing the testimony Drawing inferences, making conclusions,evaluating the facts which is the province of the jury.

SEGMENT **#2 page** 9.10 DOWDS STATEMENT

Judge Dowd gives the defendant company credit for responding to the plaintiffs racial compaints hut does not cite from record..

ARGUMENT AT LAW

Again this is a question led to the trier of tact he makes no citation from the record to verify this claim.

SEGMENTS 3 PAGE 10 DOWDS STA I EMENT

"Because all of these claims address the plaintiffs transfer,they will be considered together"

ARGUMENT AT LAW

He is generalizing the facts each individual event or allegation must he independently analyzed for accuracy of record legal interpretation.

SEGMENT #4.PAGE 12 DOWDS STATEMENT

' 1 "Plaintiff admittedly was having trouble at his job site"

2 "Finally in an effort to improve his job conditions,they decided to transfer him' they had so much in common"

ARGUMENT AT LAM

The plaintiff said he was being harassed racially and religiously not having trouble, he ignored the racial complaints that preceded the transfer,that a jury could be convinced was motivated by racial bias,likewise the transfer was involuntary and did not improve the racially hostile environment nor end the discrimination but exceberated it.The plaintiff never offended his co-workers but his co-workers racially offensive attitude and actions and unwillingness to get along with him agitated created the racially negative and hostile situation.Healso ignores the fact that the defendant cited both race and religion as the motivation for the transfer,why didn't they choose a white supervisor,they deliberately one his same or identical race and religion to support the plaintiffs allegation it was intentional discrimination,this was not a legitimate non-discriminatory reason to transfer the plaintiff.

SEGMENT# 5.PAGE 13 DOWDS STATEMENT

l"this was a solution to his problem with his co-workers"

"2 The nature of the transfer was not retaliatory and for punishment "

3"From a business perspective it was a legitimate transfer"

ARGUMENT A'l LAW

The plaintiff contends that he was being harassed and treated racially not lust having trouble and that this antagonism was being iniated by his white co-workers,this was not a remedial solution to his racially oppressive situation and did not end the discrimination.Ajury might weigh the evidence and determine that (-T.M. did in fact condone and ratify a racially hostile environment and conduct.Dowd is showing his corporate bias"from a business perspective"he is to be exparte, and see it from neutral perspective only.He likewise asserts "it would have been irrational to transfer others" the company should have taken remedial ation to terminate the racial harassment and not single out Turner for intentional discrimination and disperant treatment

OMISSION OF FA(STS

In his memorandum and opinion Judge Dowd omitted the facts that the defendant company admitted to in depositions such as:

l the placement of the bloody snake

2 the racial slurs on the three posters

3 the physical assault or punch

4 the death and physical threats

5 the pornography that was thrown on his desk

THE FACTS ABOUT ADMISSIONS IN THE DEFENDANTS DEPf)S1TIONS More recently in the O. J. Simpson trial above all the media hype, the colorful and flamboyant trial lawyers the courtroom theatrics, drama and entertainment the jury panel was shocked back to reality when the coroner's report of graphic autopsy photos were displayed before the courtroom. These gruesome pictures of Nicole Simpson and Ronald Goldman awakened the jury to the sobering reality of demoralizing criminal activity and both the tragedy and trauma that victims of crimes endure and that the case was not a three ring circus side event meant for media and entertainment but reality. I do not have graphic pictures but I do have depositions which contain admissions of these discriminatory acts, let us use our vivid imaginations, could you imagine being physically assaulted, which resulted in a black eye an your employer took no remedial action could you imagine another man making homosexual advances to you in racial terms in front of a group of CO-workers, could you imagine someone putting a dead bloody snake in your work area or desk could you imagine someone throwing lewd pornography all over your desk to humiliate and antagonize you because they knew that you were minister, could you imagine someone posting racial slurs and graphite on car carriers and in your work area to offend you, could you invasion being threatened physically, glared at belligerent profanity directed at you continually and someone threatening your life

with fire arms and knives, could you imagine going outside and seeing all of your tires flattened and you African American college students getting physically assaulted and racially intimidated as well. Could you imagine complaining to your employer who becomes indignant because he is racially bias and with the deliberate intent to discriminate tells you he is going to put you with a Baptist minister who is your same race and religion and you will get along better there because you are the same race and color. More recently the courts are arguing cases about reverse discrimination and affirmative action, that promotions should not be granted on the basis of race, when my employer decided to transfer me he cited race as his motivation for the involuntary transfer. Could you imagine turning to the legal system for justice and they let the defense unethically employ the over-use of discovery, acknowledge the inappropriate manner of discovery and consequently turn around and say in his own opinion that he did not think it was overtly racist this is the jurts function to decide.

I[. OVERUSE OF DISCOVERY Judge Dowd in his opening statement makes critical remarks about the fundamentally incorrect way discovery was conducted. It is ironic that he dismissed the case on this basis alone this unethical approach and defense strategy employed by the Defendant's counsel severely tarnished the posture of this case, it was burdened with excessive paper work and expense, hindered the business, efficiency and chronology of the entire case and court order. These unethical tactics gave the defense an unscrupulous advantage in the case. These are some illustrations 1. The case was not

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

CASE NO. 4:91 CV 0479))) MEMORANDUM OPINION

(Disposing of Docket No. 96)

"To say that the issues are "ripe for determination" is a most inadequate description of the procedural posture of this case, which was reassigned to the docket of the undersigned judge on October 1, 1993 after languishing for over 2½ years at the discovery stage. A review of the docket shows an appalling history of delay in the progress of discovery, with numerous motions for extension of the discovery deadline, filed almost exclusively by the defendant. Surprisingly, these motions appear to have been routinely and without question granted by way of marginal entry orders. This Court is also stunned to see that plaintiff alone was deposed for fully seven (7) days, resulting in some 1500 pages of deposition testimony.

This case is perfectly illustrative of the need for the passage of the Civil Justice Reform Act of 1990 and the resulting revision of the Local Rules of the Northern District of Ohio, including the passage of a Differentiated Case Management system designed to reduce cost and avoid unnecessary delay. The delay in this case is all the more unfortunate in light of this Court's ultimate determination as set forth in this Memorandum Opinion. In one month, this case will have been pending for three (3) full years, only to reach a result of summary dismissal. It is incomprehensible to this Court that so much time could have been needed to come to this conclusion.

AO 72A
(Rev. 8/82)

governed in the differentiated case management system in compliance with the local rules. The defense exploited this inappropriate way to manage a case to the maximum.

2. The Plaintiff himself was subjected to a deposition for 40 hours, other fact witnesses were harassed and intimidated with lengthy depositions ranging from 15 to 20 hours some 3 days.

3. A psychologist was employed by the defense to sit directly across from the Plaintiff in his deposition this is prohibited by Ohio Revised Code and local Rules.

4. The Defense became so outrageous that they actually deposed Rev. Gary Frost vicepresident of the Southern Baptist Convention and Pastor of an 800 membership church inside the church, this is sacnlegious and an extension of the religious discrimination that the ~~defendant~~ Plaintiff alleges in his case .

5. The Plaintiff was oppressed for over $9,000.00

6. There were no regular status conferences, framing of discovery plan to govern the interrogatories, depositions, dead lines, and trial dates.

National Association for the Advancement of
Colored People

Cleveland Branch

1949 Eat 105th street • Cleveland, Ohio 4410s2241 • (216) 231-6260

June 22, 1993

Judge Frank J. Baptists U.S. District Court
U.S. Court House Cleveland, Ohio

Judge Battisti:

I am writing on behalf of Mark A. Turner, who came to our office with concerns about procedural matters relating to his lawsuit against General Motors Corporation (Mark Turner vs. General Motors Corporation, et al. Case Number 4:91 CV 0479). Mr. Turner asked me to communicate with you because he knows of your reputation as being an honorable jurist. I have advised Mr. Turner that while I am not an attorney, not authorized to interpret the law,

I serve as an ad0tnento fnt thncn zAlhn ;--rn seeking justice in the courts.

Mr. Turner's first complaint has to do with LOCAL RULES -- ND Revised 12/92, Effective 1/1/93. According to Mr. Turner, General Motors filed a 48 page motion, on April 29, 1993, in violation of Rule 8:8.1 (f) which states that "Without prior approval of the judicial officer for good cause shown, memorandum relating to dispositive motions shall not exceed ten (10) pages in length for expedited cases ..." Mr. Turner is concerned that violation of this rule by General Motors will prejudice his case.

Next, Mr. Turner says that in oral deposition, he was subjected to interrogatories that contained subparts, compounds, conjunctives, and disjunctive questions in violation of Rule 8:7.3 (a).

Also, Mr. Turner has questions about Rule 26. General Provisions Governing Discovers, 1991 Civil Procedure Supplement. Mr. Turner believes that General Motors violated Rule 26 (b) (1) in that he was asked questions that were not relevant to the subject matter involved in the pending action.

According to Mr. Turner, under Rule 26 (b) (1) (a) (i), the discovery sought was unreasonably cumulative and duplicative nearly forty (40) hours, 1351 pages, comprising seven (7) volumes.

Further, Mr. Turner believes that General Motors violated Rule 26 (c) (4) in that he was greatly inconvenienced by having to drive from Youngstown to Cleveland on seven different occasions for

depositions at Jones, Day, Reavis and Rogue. Mr. Turner was deposed from approximately 9 a.m. to 4 p.m. each visit, sometimes until 5 p.m. Mr. Turner had to get back to his job in Lordstown at 5:30 D.m., work until 4:30 a.m., then back to Cleveland for depositions. During this period of time, Mr. Turner was, on occasions, late or absent from work, which was recorded on his personnel records. Weather conditions were generally bad during this period of time.

Mr. Turner says that Rule 26 (c) (5) was violated when a mental health professional was present at his deposition without his prior consent. Mr. Turner agreed to the presence of the doctor when he was told that if he cancelled the deposition meeting, a rescheduling of the meeting would be required and that Mr. Turner would have to pay attorney fees as well as fees for the legal expert.

MrP Turner is concerned, also, as to whether his case was governed with the Differentiated Case Management System since the case was expedited in 7!10/92. (SECTION 8: DIFFERENTIATED CASE MANAGEMENT).

Finally, Mr. Turner would like the court to cross reference Civil Rules 26 (b) and (c) 1-8; 26 (g); 30 (d); 32 (b); and 37 (g).

Thank you for your consideration in this matter.

IV SUMMATION

In summation I asked the appeals court to re-hear this racially oppressive and discrimination case and send it back to court to the trier of facts that it may be adjudicated by a judge and a jury. The defendant company General Motors is not above the law and they must respect it and be compliant to it like every one else, personally I am still being forced to live with chronic depression and anxiety with no expectations of alleviation from its cruel bondage or justice insight the company did not have a legitimate non-discrirninatory reason for the transfer and racial treatment, the remedy did not end the discrimination I have been transferred an unbelievable 72 times and subjected to even more racial treatment. I earnestly feel in like of all the facts, admissions by the defendant's company and its employees that anything less than a remanded, expedited trial date would be a grave injustice and not to the over all benefactor of our free and democratic nation. Racism is a dreaded disease that threatens the health and well-being of an American and democratic country, its symptoms are ignorance, hatred and bigotry and the only cure for it is justice.

PS. I would welcome the opportunity to personally and zealously address these matters in an oral argument

Thank you for earnest consideration

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FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARK A. TURNER

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Plaintiff

GENEpvinr ~~^~~^^~~ ~~~~ToTo et al.

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Defendant s

CASE NO. 4:91CV0479

JUDGE BATTISTI
MAGISTRATE JUDGE STREEPY

)

PLAINTIFF MARK A TURNER q MEMORANDUM IN OPPOSITION
~~ v.LssUIvl FOR SUMMARY JUDGMENT

TO DEFENDANT GENERAL aMOTORA t MVM--DES--t"--

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STATEMENT OF ISSUES_AND_.SUMMARY!OF ARGUMENT

Defendant General Motors Corporation has moved for a summary judgment. The ultimate issue is whether Defendant Company is entitled to a summary judgment dismissing Plaintiff Turner's discrimination and pendent state claims. The case raises numerous subsidiary issues which are discussed in the Memorandum

As explained in the Memorandum, a summary judgment would not be appropriate. Plaintiff Turner was subjected to a hostile

INTRODUCTION

This civil rights action was commenced by Mark Turner, a black 34 year old employee of Defendant General Motors Corporation. The cause is before the court on Defendant Company' 5 Memorandum for Summary Judgment. The reguest is without merit and should be denied.

Plaintiff Turner has been employed by Defendant General Motors since January of 1978. In February of 1990, Turner was assaulted and injured by a white co-employee at work. The employee, Jeff Ringer, is also a named Defendant in this action. General Motors supervisory personnel acknowledged that the assault merited discharge. Nonetheless, the Company did not terminate Ringer's employment. General Motors' failure to discharge the employee who assaulted Plaintiff Turner - and the Company' 5 refusal to discipline another white co-employee who made unwelcome homosexual overtures to Turner several weeks earlier - was perceived by several white co-employees as an invitation to harass and abuse Plaintiff Turner. Turner was subjected to the following:

A dead snake was placed in his work area.

- Turner's tires were slashed while the automobile was parked at the General Motors parking lot.

- The lug nuts on his automobile's wheels were loosened when the car was parked at the General Motors parking lot.

Turner was threatened by several white employees in his department.

- Turner was verbally abused by several white co-employees and his supervisor.

- Turner was subjected to racial abuse in the form of graffiti in the bathroom and three large posters in the work area.

- Pornographic materials were placed at his work table.

Defendant Company took no steps to prevent the ongoing abuse and made no effort to identify and discipline the employees who were harassing Plaintiff Turner.

The Company was fully aware that the harassment and abuse were discriminatory in nature. Turner repeatedly complained that he was being harassed by white employees because of his race and religion. A black supervisor shared his own experience of racial abuse at General Motors and told Turner to be careful since some of

his white coworkers were threatening his life. The Company's EE0 officer was consulted about the vandalism to Turner's car. Moreover, the graffiti and posters referred to Turner by race. Despite being fully aware that Turner was being targeted for racial and religious reasons, General Motors made no effort to protect Turner from the hostile work environment. The pattern of abuse and harassment continued.

Rather than preventing the harassment, Defendant Company transferred Turner to another position. There was no claim that Turner could not perform the work. Rather, Turner was transferred because the Company allowed other employees to harass and abuse him at work. The Company chose to punish the victim rather than identify and disci.pline the employees who were harassing Turner.

It should be noted that General Motors' protection of the employees who harassed Turner continues through this action. The Company is defending Ringer, the employee who supervisors believed should have been discharged for assaulting Turner at work. And, in depositions, counsel for General Motors represented white co-employees who harassed and abused Turner. The Company not only failed to prevent the hostile work environment, but now provides continued legal representation to employees who assaulted

and harassed Turner.

Turner filed a discrimination charge after the transfer. Company supervisors retaliated against Turner by abusive conduct and by unwarranted scrutiny of his work. As a result, a second charge was filed.

Defendant Company's Memorandum suggests that Turner is a malcontent who believes the world has conspired to discriminate against him. It should be noted that Turner never filed discrimination charges prior to this action. He did not complain about racial harassment while at college. Nor did Turner complain of discrimination in the many years he was employed by General Motors until the events giving rise to this action. The claim that Turner is a malcontent who believes that everybody is discriminating against him is belied by his first 12 years of employment at General Motors.

Defendant Company focuses on the involuntary transfer, and claims that the transfer was appropriate to protect Turner' 5 safety. Like starting a novel near the end, the analysis ignores the conduct which led up to the transfer. Neglecting the background of harassment and abuse that the Company invited and took no steps to prevent, the Company cites the hostile work environment it created as

justification for the transfer. The Company's distortion of the relevant facts requires a detailed discussion of the background of this dispute

As noted, General Motors mistakenly focuses on the transfer of Mark Turner. The involuntary transfer followed the Company's refusal to discipline employees who abused and assaulted Turner. This led to continued harassment of Turner which was not prevented by the Company. General Motors took no action to detect and discipline the employees who were harassing Turner. Then the Company relied on the hostile work environment it inspired and nurtured as an excuse to transfer Turner. Rather than limiting its inquiry to the transfer, the court should examine the incidents which created the atmosphere which the Company claims justified the transfer.

Turner was employed by General Motors in 1978. (Turner Affidavit at paragaraph (hereafter Turner Aff. at para.) 4).During the first 12 years of his employment, Turner did not experience harassment by his co-employees. (Turner Aff. at para. 5). After some 12 years of employment, Turner was transferred to the windshield install area. (Turner Aff. at para. 6). Turner was the only black employee permanently assigned to the area. (Turner Aff. at

para. 6).

After the transfer, Turner was subjected to a sustained and ongoing campaign of abuse and harassment which was invited and maintained by the Company. The harassment began when the Company failed to discipline employees who abused and assaulted Turner. Mark Turner worked in the same area as employee David Estes. The Turner Affidavit states:

> "8. In early 1990, I was subjected to homosexual remarks by David Estes, a white co-employee working in the windshield install department. I complained to Greg Brown, our supervisor, who is white. I told Brown that Estes made comments about my ass. I told Brown that Estes said I had a `cute ass; that he would like to take me to a motel and would buy me breakfast in the morning; and that Estes said that my `ass looked so good the come was running down [his] legs.' Estes' comments about my `ass' were couched in racial terms. Estes was not disciplined for making these remarks." (Turner Aff. at para. 8).

Estes was not disciplined for the misconduct. He was simply told to "knock it off" by the supervisor, and received no reprimand or written warning. (Estes Dep. at p. 70).

The failure to discipline Estes is significant in light

of that employee's work history. Estes testified that he received a thirty-day suspension for calling a white fellow employee an "asshole". (Estes Dep. at p. 58). Estes also received a thirty-day suspension for accidently bumping into a white co-employee. (Estes Dep. at pp. 64, 65). Turner's Affidavit notes that "Estes received lengthy suspensions for harassing Fabian Ligouri and Gene Vukovich, two white employees." (Turner Aff. at para. 8). Yet, no discipline was imposed on Estes for remarks to Turner which were at least as serious as calling an employee an "asshole" or accidently bumping into a co-worker. Several weeks later, Turner was assaulted by a fellow employee. Turner' s Affidavit states:

> "9. Shortly thereafter, I was assaulted by General Motors employee Jeff Ringer while at work. Ringer said that I had cut in front of a white friend of his while clocking out of work. I was struck in the face and seriously injured by Ringer, who is white. Brown investigated the assault, and Ringer received a disciplinary layoff. However, Ringer was soon reinstated." (Turner Aff. at para. 9).

Ringer, it should be noted, had a troubled employment history which included drinking on the job. (Brown Dep. at p. 43).

Patricia Beale, a staff nurse employed by General Motors, testified that Mark Turner reported to the medical facility at the Lordstown plant and complained that he was assaulted by a co=employee. (Beale Dep. at pp. 4, Il). Nurse Beale stated that Turner was suffering from, contusions and swelling of his left cheek and temple and that these injuries were consistent with Turner' s statement that he was punched. (Beale Dep. at pp. 12, 18).

General Motors supervisory officials acknowledged that the assault merited discharge.

> Greg Brown, the supervisor of Turner and Ringer, decided that Ringer should be discharged. He explained that an assault carries a penalty of discharge and testified that "we felt an attack of this sort should be dealt with extremely positively, to send out messages that we as manager would not tolerate any assaults on the floor." (Brown Dep. at p. 41).

- John Brincko, General Motors Labor Relations Specialist agreed. He concluded that Ringer should be discharged. Brincko testified that "there was

misconduct an assault took place. And I felt the appropriate penalty was discharge." (Brincko Dep. at p. 20).

- Noel Neal was Supervisor of Labor Relations. He testified that discharge was appropriate. Neal concluded that Ringer punched Turner and should be terminated. (Neal Dep. at pp. 8, 36-38).

Despite the recognition that the unprovoked assault merited Ringer's discharge, Ringer was reinstated by the Company. Ringer lost only one week's pay and his record was cleared. (Ringer Dep. at pp. 37, 38).

The Company did not terminate Ringer in accordance with the judgment of Supervisor Brown, Labor Relations Specialist Brincko, and Supervisor of Labor Relations Neal. All testified that Ringer should have been discharged, and Supervisor of Labor Relations Neal stated that the Company could establish that Ringer punched Turner. (Neal Dep. at p. 38). In its brief, the Company defends its reinstatement of Ringer by claiming that co-employees had

not seen the incident. The asserted reason for ignoring the judgment of its own supervisors is clearly suspect.

Union members at General Motors are understandably reluctant to get other union members in trouble, and the unwillingness of co-employees to implicate Ringer is not surprising. In the words of one union official cited by the Company: "Basically, no one wanted to get involved." (Smith Dep. at p. 68). Moreover, if the Company really believed that Ringer did not assault Turner, why did he receive a one-week loss of pay? And, how does the Company explain the contusion and swelling of Turner's cheek and temple which a nurse in the medical department treated. (Beale Dep. at pp. 4, 12). Nurse Beale testified that Turner's injuries were consistent with Turner's statement that he was punched by a fellow employee. (Beale Dep. at pp. 11, 18). The excuse the Company now relies on for rejecting the judgment of Brincko, Danko and Neal that Ringer should have been discharged is clearly suspect.

General Motors supervisory personnel acknowledged that Ringer should have been discharged for assaulting Plaintiff Turner. Yet, Ringer received only a one-week loss of pay and his record was

cleared of the discipline. The token penalty is patently insufficient given the gravity of the offense and the recognition by General Motors supervisory officials that discharge was the appropriate response. It should be recalled that Estes was suspended for thirty days for bumping a white co-employee.

The refusal to impose any discipline on Estes and Ringer's reinstatement sent a powerful message to Turner's fellow mployees. Turner could be targeted for abuse and harassment and the Company would not protect Turner from this hostile work environment. After the Estes and Ringer incidents, Turner was subjected to sustained harassment and abuse. General Motors did nothing to prevent this harassment and made no effort to find the culpable parties. Having invited harassment by failing to dequately discipline Estes and Ringer, the Company stood back while Turner was subjected to continued threats, abuse and harassment.

The Turner Affidavit states:

> bathroom, the words "Dark Mark sucks" was"10. After Ringer was reinstated, I was subjected to ongoing harassment because of my race and religious views. Among the more serious incidents are the following:

A. A dead snake with its throat bloody was placed by the pedal of the machine at my work station. Estes pointed to the snake and said "Look, we got something for you."

B. The tires of my van were slashed when it was parked at the General Motors parking lot. The van was not drivable, and I had to be driven home by Dolores Adams, a co-worker.

C. I replaced the tires, and shortly thereafter, the lug nuts on the wheels were loosened. I reported these incidents to - Sergeant Doug Kress of the General Motors me. Security Department, but he took no action.

D. A white co-employee, John Karash, He said he would kick mv ass, called me a crybaby son-of-a-bitch, and directed obscene and profane comments at I reported the incident to Supervisor Brown.threatened me at work.

E. Co-employee Carl Cononico also threatened me. Cononico, who is white, pressed up against me and said that he would kick my ass. Cononico was restrained by a co-employee and he went back to his work station and started throwing work gloves at me. I reported the incident to Brown.

F. I was verbally abused by Ken Click, a white employee, in the presence of Greg Brown. He called me an asshole, a punk and a mother fucker and said he would like to kick my ass in front of the supervisor. The next day, I was threatened by Ken Click. Click called me a son-of-a-bitch and directed other profane language at me. Click said that he would kick

my ass. Click said that he had been to Vietnam, that he owned guns and knives, that he had stabbed somebody, and had engaged in gun play. After threatening me, Click falsely accused me of having threatened him. Brown accepted Click's accusation. I informed Brown that I had been threatened by Click but the Company only sought to discipline me. I was

transferred to the department of Jim Mass, a black Baptist Minister. I objected to the transfer and advised General Motors supervisory personnel that any problems in the department were caused by General Motors failure to stop white employees from harassing and abusing me. I was told that since I refused the transfer I would be suspended. Since I did not threaten Click, there was no basis for the discipline. I 5uccessfully grieved the suspension and received full back pay.

G. `W'hite coemployee, Earl Thompson, loudly and violently started cursing me at work. He repeatedly yelled "mother fucker" at me and said I should go fuck myself. I reported Thompson's violent outburst to Brown.

H. Over several days and at times in the presence of Supervisor Brown, I was cursed at and abused by white coemployee, Russ Howard. Howard would come up to me, call me a mother-fucker and asshole, and make obscene gestures at me. The obscene language and gestures continued over three days and I eventually complained about the conduct to Brown.

I. Supervisor Brown not only failed to stop or attempt to stop the harassment, but joined in the abusive conduct. Brown referred to me as a "lucky mother-fucker" and said that he was tired of this mother-fucker. He also said that I reminded him of his little girl.

J. I was also abused and harassed by other white employees. Two white glass fitters that I knew as Ron and John and a repairman named Russ kept calling me an asshole and mother-fucker. A white employee named Porter called me an asshole and told me to think about that when I am preaching.

K. I saw large posters at work and on the assembly line which referred to me and my race. One poster read "Mark sucks" and the words "Darky Marky" were written on another poster. The words "Dark Mark, the All-American Loudmouth" was placed on a poster of a black basketball player. These posters were displayed at work.

L. There was also graffiti at the plant which referred to me and my race. In the

written on a stall. After I was transferred, I saw other graffiti which said "Good-bye Mark Turner" and "We won, Mark Turner."

M. In addition to the offensive, profane and obscene language directed at me by white co-employees, pornographic material would be placed at my work station. Pornographic material was placed there by white employees, Estes and Cameron. I complained about this to my supervisor.

These and other incidents occurred after Ringer was reinstated. The Company took no effective action to prevent the abuse and harassment." (Turner Aff. at para. 10).

In its summary judgment motion, the Company does not deny that the arassment took place. Rather, the Company claims that it attempted to prevent the abuse. The Company's self-serving claim is patently false.

In the course of discovery, several of Turner' s co-workers were deposed. They uniformly testified that the Company made no effort to investigate the harassment of Turner. The employees, some of whom were known by management to have harassed Turner, testified that they were never asked by Company officials about the incidents that Turner complained about. The following co-workers all testified that General Motors did not inquire whether they had information concerning the abuse of Turner.

> Kenneth Click testified that no Company employee inquired whether he had any knowledge of the incident involving the dead snake, the vandalism of Turner' s car or the defamatory posters. (Click Dep. at pp. 35-37).
>
> - Margaret Danko was not asked by any Gen-

eral Motors official about the posters or the vandalism to Turner's automobile. (Danko Dep. at pp. 43, 44)*

- Beverly Badget testified that no General Motors employee spoke with her concerning the posters and the vandalism of Turner's automobile. (Badget Dep. at pp. 12-15).

- Carl Cononico was not asked by General Motors officials whether he had any knowledge of the vandalism to Turner's car or the racial graffiti. (Cononico Dep. at pp. 38, 45, 47-49, 59, 60).

- Nancy Vukovich testified that she was not asked about the snake, the posters, or the vandalism to Turner's car. (Vukovich Dep. at pp. 21-25).

- Russell Cameron testified that no General Motors supervisor inquired about the posters snake, or the vandalism to Turner's car. (Cameron Dep. at pp. 35-42).

- David Estes testified that General Motors officials did not ask him whether he had any knowledge of the dead snake, the racial graffiti, or the vandalism to Turner's car. (Estes Dep. at pp. 98, 99, 101-104).

- John Karash was not asked about the snake, the vandalism to Turner's car, or

the posters. (Karash Dep. at pp. 29-32).

The Company never asked these co-workers of Plaintiff Turner whether they had any knowledge concerning the snake left at Turner's work station, the vandalism to Turner's car, the graffiti, the posters or the other abuse to which Turner was subjected. The Company was made award of the incidents but made no effort to find and discipline the employees who were harassing and abusing Mark Turner.

* During discovery in this lawsuit, Danko admitted that she put the snake near Turner's work area. Danko works in the same area as Turner. (Danko Dep. at p. 8). Previously, Turner spoke with Danko concerning Danko's complaints about the music listened to by black employees on the job. (Turner Dep. at pp. 353, 354.). The Company does not explain why it did not uncover Danko's responsibility for the snake prior to this action or why Danko had not been disciplined.

Significantly, the Company does not represent that it made a serious attempt to discover the employees responsible for the vandalism to Turner' s car, or the racial graffiti or posters. In fact, the Company did little more than conveniently lose the offending evidence. Turner's foreman, Greg Brown, testified that he removed two posters after Mark Turner complained about them. (Brown Dep. at p. 54). Brown took them to his office. (Brown

Dep. at p. 54). However, according to Brown, one of the posters was stolen from his office. (Brown Dep. at p. 54). Brown did not call Plant Security about the theft. (Brown Dep. at p. 55). The remaining poster was delivered to John Brincko of Labor Relations. Brincko claims to have no recollection of what he did with it, and testified that it is lost. (Brincko Dep. at pp. 41, 42).

For obvious reasons, the Company' s brief is silent with respect to any investigation of the vandalism to Turner' s car or the racially offensive posters. If the Company made a serious attempt to investigate these incidents, the abuse of Turner may have ended. By neglecting to identify and then punish the employee or employees who harassed Turner, the Company sent a powerful message. Employees were free to abuse and harass Turner and the Company would either ignore the incidents or only make a token investigation. The message was not lost on the employees who continued to harass and abuse Turner.

Ironically, the only discipline meted out during this period was imposed on Mark Turner. Turner was threatened by Ken Click, a white employee. Turner's Affidavit states:

> "F. I was verbally abused by Ken Click, a white employee, in the presence of Greg Brown. He called me an asshole, a punk and a mother

fucker and said he would like to kick my ass in front of the supervisor. The next day, I was threatened by Ken Click. Click called me a son-of-a-bitch and directed other profane language at me. Click said that he would kick my ass. Click said that he had been to Vietnam, that he owned guns and knives, that he had stabbed somebody, and had engaged in gun play. After threatening me, Click falsely accused me of having threatened him. Brown accepted Click's accusation. I informed Brown that I had been threatened by Click but the Company only sought to discipline me. I was transferred to the department of Jim Mass, a black Baptist Minister. I objected to the transfer and advised General Motors supervisory personnel that any problems in the department were caused by General Motors' failure to stop white employees from harassing and abusing me. I was told that since I refused the transfer I would be suspended. Since I did not threaten Click, there was no basis for the discipline. I successfully grieved the suspension and received full back pay." (Turner Aff. at para. 10).

The Company wrongfully sought to discipline Turner and he successfully protested the penalty. However, the Company did not discipline white employee Click who threatened Turner. This is part of a sad pattern in which General Motors refused to discipline white employees who threatened Plaintiff Turner.

The Company's vigor in punishing Turner should be

compared with its indifference in handling matters where Turner was the victim of abuse. Turner's Affidavit states that he was threatened and abused by white co-employees, including Carl Cononico, John Karash and Earl Thompson. These employees were not punished for the same conduct which the Company claimed merited Turner's suspension.

- Cononico threatened Mark Turner. He was not disciplined. In fact, Cononico was not even asked about Turner's accusations. (Cononico Dep. at pp. 59, 60).

- Karash threatened Turner and was suspended. However, he objected and was later paid for the hours he missed. (Karash Dep. at p. 26).

- Thompson threatened Turner. However, Thompson was never disciplined. (Brown Dep. at p. 79).

The Company, while quick to discipline Turner, made no effort to protect Turner from the threats of white co-employees.

The disparate treatment is evident. When Turner is falsely accused of threatening a white co-employee, he is suspended and involuntarily transferred. But white employees were free to threaten and abuse Turner. When Turner told Brown he was threatened by Carl Cononico, the supervisor did not even investigate

the charge or speak with Cononico. An alleged threat by Turner is sufficient to justify his suspension and transfer, but a white employee threatening Turner did not even merit an investigation.

Turner was targeted for this abuse because of his race. The graffiti and posters obviously have racial connotations. The picture of a black basketball player and the words "Dark Mark" and Darky Marky" refer to Turner's color and are racially offensive. Whil.e the other abuse is less obviously directed at Turner's race, the Company was fully aware that Turner was harassed because he is black.

Turner's Affidavit states:

> "11. During the period I was being harassed by white employees, I spoke with Willy Fuller, a black supervisor. Brown pulled me off the line to speak with Fuller who is an ordained Deacon in the Baptist Church. Fuller told me to be careful because some of my white co-workers were endangering my life. He told me that he had experienced racial abuse at General Motors and urged me to move to another department...
>
> 12. I repeatedly advised General Motors supervisory officials that I was being threatened, abused and harassed because of my race and religion. I told Labor Relations Specialist Brincko and EE0 Supervisor Testa that I was being harassed because I was black

> and a Christian. When I advised them that Cononico had threatened me, they told me to talk to a union official. I told Brincko that he was biased and insensitive to my civil rights. I reminded Brincko that General Motors had discharged an employee for harassing a white woman and had suspended Estes for swearing at white co-employee Ligouri, and was therefore practicing a double standard by failing to prevent the threats and harassment of me by white co-employees. I made General Motors officials aware that the abuse to which I was subjected was based on white employees' hostility to my race and religion." (Turner Aff. at paras. 11, 12).

Turner repeatedly complained that he was being abused because of his race and religion, and a black supervisory employee, who shared his own history of racial abuse at General Motors, told Turner that he was targeted by white employees who were endangering his life.

Turner complained about the vandalism to his car. While automobiles of white employees could be similarly vandalized, General Motors officials recognized that this incident had racial implications. After Turner's car was vandalized, he met with Madeline Testa, the EE0 Supervisor, at Lordstown. Testa is responsible for handling discrimination matters. (Testa Dep. at pp.

3, 10). Turner was referred to Testa by Labor Relations Specialist Brincko who explained why Turner was sent to the EE0 Supervisor:

> "Well, Mark is a black man, okay. That you know. In all honesty, that's the reason."
>
> (Brincko Dep. at p. 26).

Brincko recognized that Turner was targeted for harassment because of his race and referred Turner to the EE0 supervisor.

Testa testified that she did not contact security to investigate the vandalism to Turner's automobile. (Testa Dep. at p. 20). Nor was security called to investigate the posters or the other acts of harassment or vandalism. (Brown Dep. at p. 55). John Roberts, Manager of Human Resources, testified that such incidents should be investigated by security. (Roberts Dep. at p. 22). But no such investigation took place. The Company promised the Union that it would investigate and stop the conduct, (Brincko Dep. at p 37), but made no effort to have security investigate the incidents. Nor, as explained above, did the Company even ask Turner's white co-employees about the incidents.

The Company's protection of those who harass Turner continues in this lawsuit. Though its supervisory personnel

acknowledged that Ringer assaulted Turner and should have been discharged, the Company now provides an attorney for Ringer. Also, in depositions, the Company's counsel represented all of the white co-employees who harassed Turner. See, e.g., Estes Dep. at pp 11-14. The Company not only protected the wrongdoers when they were abusing and harassing Turner, but continues to protect the employees during this litigation by providing them with legal counsel.

It should be noted that Mark Turner was not the only black employee harassed by some of these same individuals. White employee Russell Cameron punched Gabriel Artis, Jr., a black summer worker who worked in the same department as Turner. (Cameron Pep. at p. 20). General Motors supervisory employees were advised of this incident (Brincko Pep. at p. 49), but Cameron, also known as Bird," was not disciplined. (Cameron Pep. at pp. 4, 20). Artis' Affidavit states:

> "1. I am black and a student at Ohio State University. I am working this summer as a student helper at the Lordstown General Motors facility. I also worked at the General Motors Lordstown facility during the summer months as a student helper in 1990. This affidavit is based on my personal knowledge.
>
> 2. In the summer of 1990, I worked for General Motors in the windshield install area of the Lordstown Plant. Mark Turner worked in

that department, and Greg Brown was our foreman.

3. Puring the summer of 1990, I was punched at work by°a white co-employee who I knew as Bird. Mark Turner complained to Greg Brown, our foreman, on my behalf. Brown pulled me off the line, and I told him that I was punched by Bird. Brown warned me to keep my nose clean. Brown did not speak with Bird, and Bird was not warned or disciplined in any way for Punching me." (Artis Aff. at paras.1-3. 1-3).

The Affidavit notes that black and white employees were treated differently with respect to the use of their radios, and the General Motors supervisor used the term "nigger" when referring to the music listened to by Artis. (Artis Aff. at para. 5). The Affidavit concludes that there was racial tension on the line that was not caused by Mark Turner. (Artis Aff. at para. 8).

Tiffany Williams, a black female, also worked near Mark Turner under the supervision of Greg Brown. (Williams Aff. at para. 3). Her Affidavit describes the racial discord that permeated the work place:

"5. During my employment in the Hard Trim Department, I often observed great animosity directed toward the black employees by the white employees in the Department. Black employees were often treated very rudely by

their white coworkers.

6. A white co-worker named John Karash, once told me that blacks should wear their hair in afros and braids.

7. A white co-worker named Earl Thompson, who was my A.R.0., often asked me about my black female friends. On several occasions, he stated he wanted to `be with' a black woman of my complexion. Thompson would complain about his marriage. He would also frequently rub my back or my leg and suggest that we should go out to his car and kiss. It was obvious that Thompson was under the influence of alcohol or drugs. There were occasions when I could smell alcohol on his breath. A female co-worker told me that she had told Greg Brown that Thompson was drunk, but nothing was done about it.

8. There was an occasion where, during a break, I was speaking with a male black co-worker named Tyrone. Observing our conversation, Earl Thompson became very rude. Tyrone told Thompson to mind his own business. Thompson responded that Tyrone should `shut up' because he would `fuck around and get shot. Thompson, as my A.R.0., was responsible for relieving me during my break. He refused to do this until being ordered by his supervisor to do so. While he was relieving me, Thompson threw my stool into the dumpster and began gossiping about me with other employees. I informed Greg Brown about what Thompson had done with my stool, but Brown did nothing about it.

9. White employees in the Hard Trim

> Pepartme~~ often complained about black employees' music. Greg Brown frequently told black employees to turn the volume of their music down. However, white employees' music was played just as loudly, with no warnings from Greg Brown." (Williams Aff. at paras. 5-9)

She described Mark as "well-mannered and intelligent" and continued: "I often observed white employees in the hard trim department being very rude to Mark Turner, although he was always polite." (Williams Aff. at para. 4).

Jim Smith is a General Motors employee and Chairman of the union's Civil Rights Committee. (Smith Pep. at p. 4). He testified that in addition to Mark Turner, other black employees complained of racial harassment by Turner's foreman, Greg Brown. (Smith Pep. at pp. 88, 89). It was reported to Smith that Brown made statements such as "Blacks are lazy." (Smith Pep. at p. 95).
Smith testified that Brown acknowledged that he singled out Mark Turner for criticism and that Brown apologized to Turner and agreed to stop the practice. (Smith Pep. at pp. 24, 25). Based upon his investigation5 of Mark Turner's situation, Smith concluded that Turner's being singled out for criticism by Brown and Turner's transfer out of the windshield install area were racially

motivated. (Smith Pep. at p. 99). Smith testified that he advised the Company EEO Supervisor Testa of racial problems in the area and told her that General Motors "should get involved and correct the problem." (Smith Pep. at pp. 64, 65).

Turner's Affidavit notes the other problems experienced by other black employees:

> "IS. I was not the only employee subjected to racial harassment and abuse. A black summer worker by the name of Gabriel Artis was assaulted by a white co-employee on one occasion. I reported the incident to Greg Brown, but the white employee was not disciplined. Several other black employees in the department also told me they had experienced and complained about racial abuse by white co-employees. We are permitted to listen to music while working on the line. White employees often complained that black employees were listening to black music which they said was too loud. The supervisor ordered the black employees to turn down the volume or turn off the radio though it was played no louder than the music listened to by white employees. I told the supervisor that this was another example of General Motors accommodating white employees at the expense of black workers." (Turner Aff. at para. 15).

The hostile work environment affected not only Turner, but other black employees.*

As noted, Mark Turner is a Southern Baptist Minister. His strong religious views are well known by Turner's fellow

employees. (Estes Pep. at p. 78). Kenneth Click, one of Turner's co-workers in the windshield install area, testified that ".1- noticed a friction that was there because of his religious aspect

* The pervasive discriminatory conduct in the facility was discussed at length in Turner's deposition. See, e.g., Turner Pep. at pp. 864-876, 1224-1231, 1236-1242, 1247-1252. Turner testified that he learned about an incident where white employees were in the General Motors parking lot with Ku Klux Klan hoods over their heads, and another incident "where some white employees put a picture of a black man with a string tied to his penis, which was tied to the trigger of a double barrel shotgun, with a white woman bent over, saying this is the solution to the nigger problem." (Turner Pep. at p. 1236). The relevant portions of the transcript were deleted from the edited portion of the Turner deposition originally submitted by the Company.

versus the other people..." (Click Pep. at p. 29). Aware of Turner's religious views, fellow employees repeatedly directed profanity at him and placed pornographic literature on his desk at work. The Company did not stop this conduct. In fact, Turner' s supervisor, Greg Brown, called Turner a "mother fucker". (Brown

pep. at p. 68).

Having poisoned the atmosphere, the Company then decided that Turner should be transferred for his own good. The Company argues here that Turner was transferred for his mental and physical well being. The Company neglects to mention that the harassment and abuse to which Turner was subjected was directly attributable to the Company's conduct and General Motors' refusal to take any meaningful steps to protect Turner from the hostile work environment. Having made no effort to find and discipline the wrongdoers, the Company decided to discipline the innocent Turner by transferring him from the windshield install area to another position under a black foreman. The wrongdoers are free to continue to practice racial harassment, but the victim is displaced from his regular job. The lesson was not lost on those employees who harassed Turner. Graffiti in the bathroom read "We won, Mark Turner." (Turner Aff. at para. 10; Brown Pep. at pp. 80, 81).

Turner was transferred to a new department. Turner had no experience for that position, and was transferred to that department only because Jim Mass was the supervisor. Mass, like Turner, is a

black Baptist Minister. In transferring Turner, the

Company considered Turner's race and religion. Mark Turner's Affidavit states:

> "13. Rather than acting to prevent the hostility, threats and abuse of me by white employees, General Motors transferred me to a new department. I was replaced by a white college student. I was assigned to work under Supervisor Jim Mass. I had earlier been encouraged to transfer to Mass' department because he is black and a fellow Baptist Minister. I refused because I was familiar with the windshield install department and did not want to surrender to discriminatory conduct. When I was involuntarily transferred, Brincko told me that I was to work under Jim Mass because Mass shared my race and religion. He also referred to another black Christian in Mass' department. In transferring me, Brincko repeatedly emphasized my race and religion. Brincko told me if I protested the transfer I would be disciplined. I objected to the transfer and spoke with Jack Roberts, Manager of Industrial Relations. I informed him that there was no basis for the transfer and the excuse offered by the Company was just a pretext. I stated further that management was showing a racially biased attitude by transferring me rather than preventing the harassment and threats." (Turner Aff. at para. 13).

After the transfer, Turner filed a discrimination charge.

The charge led to further harassment and abuse. Turner's Affidavit states:

"14. After the involuntary transfer, I filed discrimination charges against General Motors. General Motors retaliated against me for filing the charges. I was transferred from department to department and required to perform new and different duties. This is unusual at General Motors. I was more closely scrutinized on the job, subjected to continuous supervision, and repeatedly warned that if I made any mistake I would be disciplined. This ongoing and zealous scrutiny never occurred until I filed a discrimination charge. General Motors did not adequately train me for the new job and I received a disciplinary layoff for poor job performance. General Motors Supervisor Gasperic]c, who is white, often referred to the discrimination charges against General Motors in conversations with me. Because of the stress caused by the harassment, I was reporting to medical on occasion. Gasperick ordered me to stop. I was screamed at by Labor Relations Representati~~ John Brincko for inadvertently attempting to park in the wrong parking space. I was told not to use a common walkway near a white employee who falsely accused me of bothering her." (Turner Aff. at para. 14).

The Company not only involuntarily transferred Turner, but continued to harass him after the transfer because he filed discrimination charges.

Mark Turner has experienced emotional problems. Though wholly irrelevant to the summary judgment motion, the Company emphasizes Turner's difficulties. Presumably, General Motors believes that an employer is relieved of its obligations under the Civil Rights Act if the complaining employee has experienced emotional problems.

Defendant Company seeks a summary judgment on the grounds of liability. Essentially, the Company argues that it did not engage in any improper conduct. The appropriateness of a summary judgment turns on Defendant Company's conduct and not the emotional condition of Turner. The extent to which Mark Turner was harmed by the Company's civil rights violations is a damage issue. Defendant Company seeks dismissal on liability grounds and the appropriate measure of damages is simply not relevant here.

In any event, there is ample evidence in the record that Defendant Company's improper conduct aggravated Turner's medical condition. Turner's Affidavit states:

> "16. For years prior to 1990, I had emotional problems and had received psychiatric treatment. General Motors was aware of this. The ongoing abuse and harassment referred to above, the Company's unwillingness to prevent the harassment, and the involuntary transfer aggravated my condition. I have been more

> depressed, anxious and worried as a result of the racial and religious harassment. (Turner Aff. at para. 16).

Turner's conclusion is supported by two psychiatrists - Dr. Cesar Ariza and Dr. Daniel Guy.

Both Dr. Ariza and Dr. Guy testified that Turner's emotional conditions worsened as a result of the conduct complained of in this complaint. (Ariza Pep. at pp. 94, 95, 144-147; Guy Dep. at p. 359-364, 370, 371). These expert witnesses belie any claim by General Motors that its conduct did not aggravate Turner's emotional problems.

Defendant Company presumably recognizes that Turner's emotional condition is not at issue at the summary judgment stage. Turner's problems were discussed in detail by the Company in the hopes of shifting the inquiry from its wrongful conduct. The Company's creation and tolerance of a hostile work environment is the issue here and not the extent to which the Company's wrongdoing harmed Mark Turner.

ARGUMENT AND LAW

Defendant Company has moved for summary judgment. In Anderson v. Liberty Lobby, Inc, 477 U.S. 242 (1986), the Supreme

Court explained:

> "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes, 398 US, at 158-159, 26 L Ed 2d 142, 90 S Ct 1598. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. Kennedy v. Silas Mason Co. 334 U.S. 249, 92 L Ed 1347, 68 S Ct 1031 (1948)." 477 U.S. at 255.

In considering the Company's motion, the evidence submitted by Plaintiff Turner "is to be believed, and all justifiable inferences are to be drawn in his favor."

Defendant Company acknowledges that Turner's evidence must be credited. "For purposes of this motion", Defendant Company concedes, "Plaintiff's version of the facts is assumed to be true..." (Brief at p. 4, note 5). Plaintiff Turner has presented ample evidence to support his claim and a summary judgment is simply not warranted. For purposes of this motion, the following evidence must

be accepted as true:

> That a white co-employee made homosexual remarks with racial overtones to Plaintiff Turner which Turner reported to the General Motors supervisor. The

employee was not disciplined. Shortly thereafter, Defendant Ringer assaulted Plaintiff Turner. Though the supervisory employees concluded that Ringer should have been discharged, he was reinstated with only a one-week suspension. When white employees were the victims of far less serious offenses, the Company imposed more severe punishment than the token discipline for' harassing and assaulting Mark Turner.

- That after Ringer was reinstated, Plaintiff Turner was subjected to abuse and harassment. The harassment included the following: placing a dead snake in his work area; ~andalizing Turner s car on two occasions; threats and abuse by coemployees; graffiti and posters referring to Turner's race; and placing pornographic materials in his work area.

- That Turner reported each incident to General Motors supervisory officials and complained that he was being harassed and abused because of his race and his religious views. The Company did not punish any employee for their harassment of Turner and did not even ask co-employees if they had information about the incidents.

- That Turner was suspended and transferred because a white co-employee falsely stated that he was threatened by Turner. White co-employees who did, in fact, threaten Turner were not disciplined by the Company, and one was not even asked about the threat by Company officials.

- That the Company did not end the harassment. Rather than punishing those responsible for the harassment, the Company involuntarily transferred Turner to a new position. After the transfer, and the EEOC charge, Turner was transferred from department to department and required to perform new and different duties. He was more closely scrutinized on the job, subjected to continuous supervision, and repeatedly warned that if he made any mistakes he would be disciplined. General Motors did not adequately train him for the new job and

he received a disciplinary layoff for poor job performance. A white General Motors supervisor repeatedly referred to the discrimination charges against General Motors in conversation with Turner, and told Turner not to report to medical. Turner was screamed at by Brincko for inadvertently attempting to park in the wrong parking space.

These facts, which again must be accepted as true for purposes of this motion, are sufficient to overcome the reguest for summary judgment. In its motion, Defendant Company focuses on the

involuntary transfer of Turner. The Company claims:

> "The crux of plaintiff's claim against General Motors is its decision to move plaintiff out of the windshield install area in October 1990." (Brief at p. 2).

The Company continues that it is not liable for the transfer since "Plaintiff was moved due to concern for his safety and well-being." (Brief at pp. 2, 3). The argument is disingenuous since the hostile environment cited by General Motors as the basis for the transfer was invited and condoned by Defendant Company. The Company's tolerance of the harassment which preceded the transfer is actionable under Title VII.

In Patterson v. McLean Credit Union, 491 U.S. 164 (1989) the Supreme Court explained that Title VI I,

> "makes it unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.' 42 U.S.C. Section 20O0e-2(a)(1). Racial harassment in the course of employment is actionable under Title VII's prohibition against discrimination in the terms, conditions, or privileges of employment. 491 U.S. at 180.

Citing Patterson, the Sixth Circuit agreed that:

> "Racia! and sexual harassment which create an offensive or hostile work environment are actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 20O0e, et seq." Griqqs v. National Railroad Passenger C~., Inc., 900 F.2d 74, 75 (6th Cir. 1990).

Before considering the transfer, it is therefore essential to first examine the Company's role in creating the conditions which General Motors relies upon to justify Turner's transfer.

I. GENERAL MOTORS CONDONED A DISCRIMINATORY WORK ENVIROMENT

In Davis v. Monsanto Chemical Co., 858 F.2d 345 (6th Cir. 1988), the Sixth Circuit agreed with those courts "finding Title VII violations where an employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employee lost any tangible job benefits as a result of a discrimination." 858 F.2d at 348. The court discussed the showing required to support such a claim.

The court explained that,

> "The plaintiff must show that the alleged racial harassment constituted an unreasonably abusive or offensive work related environment or adversely affected the reasonable employee's ability to perform the tasks required by the employer." 858 F.2d at 349.

The court continued that "the plaintiff need not prove that the instances of alleged harassment were related in either time or type", 858 E.2d at 349, and added:

> "all that the victim of racial harassment need show is that the alleged conduct constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to do his or her job." 858 F.2d at 349.

The court explained that if the employer is made aware of such conditions, it must take appropriate measures to remedy the situation:

> "If the plaintiff can prove that the racially motivated conduct constituted such an environment, he or she must then show that the employer `tolerated or condoned the situation. In order to hold the employer liable for the conduct of the victim's co-workers, the plaintiff must establish that the employer knew or should have known of the alleged conduct and failed to take prompt remedial action." 858 F.2d at 349.

Under the holding in Davis Plaintiff Turner must show that he was subjected to an "unreasonably abusive or offensive work related environment"; that the Employer "knew or should have known of the alleged conduct"; and that the Employer "failed to take

prompt remedial action." Plaintiff Turner has made the required showing.

A. Turner Was Subjected To A Hostile Work Environment.

Plaintiff Turner has been employed by General Motors since 1978. Beginning in 1990, he was subjected to a sustained campaign of racial and religious harassment.

Turner was subjected to unwelcome homosexual advances by a co-employee and assaulted by Defendant Ringer. The Company did not seriously discipline either employee for abusing and assaulting Mark Turner. Thereafter, Turner was subjected to a sustained campaign of harassment. Turner' s Affidavit details the incidents that occurred after the Company disregarded the judgment of its own supervisory personnel and reinstated Ringer:

> "10. After Ringer was reinstated, I was subjected to ongoing harassment because of my race and religious views. Among the more serious incidents are the following:
>
> A. A dead snake with its throat bloody was

placed by the pedal of the machine at my work station. Estes pointed to the snake and said "Look, we got something for you."

B. The tires of my van were slashed when it was parked at the General Motors parking lot. The van was not drivable, and I had to be driven home by Dolores Adams, a co-worker.

C. I replaced the tires, and shortly thereafter, the lug nuts on the wheels were loosened. I reported these incidents to Sergeant Doug Kress of the General Motors Security Department, but he took no action.

D. A white co-employee, John Karash, threatened me at work. He said he would kick my ass, called me a crybaby son-of-a- bitch, and directed obscene and profane comments at me. I reported the incident to Supervisor Brown.

E. Co-employee Carl Cononico also threatened me. Cononico, who is white, pressed up against me and said that he would kick my ass. Cononico was restrained by a co-employee and he went back to his work station and started throwing work gloves at me. I reported the incident to Brown.

F. I was verbally abused by Ken Click, a white employee, in the presence of Greg Brown. He called me an asshole, a punk and a mother fucker and said he would like to kick my ass in front of the supervisor. The next day, I was threatened by Ken Click. Click called me a son-of-a-bitch and directed other profane language at me. Click said that he would kick my ass. Click said that he had been to

Vietnam, that he owned guns and knives, that he had stabbed somebody, and had engaged in gun play. After threatening me, Click falsely accused me of having threatened him. Brown accepted Click's accusation. I informed Brown

that I had been threatened by Click but the Company only sought to discipline me. I was transferred to the department of Jim Mass, a black Baptist Minister. I objected to the transfer and advised General Motors supervisory personnel that any problems in the department were caused by General Motors failure to stop white employees from harassing and abusing me. I was told that since I refused the transfer I would be suspended. Since I did not threaten Click, there was no basis for the discipline. I successfully grieved the suspension and received full back pay.

6. White coemployee, Earl Thompson, loudly and violently started cursing me at work. He repeatedly yelled "mother fucker" at me and said I should go fuck myself. I reported Thompson's violent outburst to Brown.

H. Over several days and at times in the presence of Supervisor Brown, I was cursed at and abused by white co-employee, Russ Howard. Howard would come up to me, call me a mother-fucker and asshole, and make obscene gestures at me. The obscene language and gestures continued over three days and I eventually complained about the conduct to Brown.

I. Supervisor Brown not only failed to stop or attempt to stop the harassment, but joined

in the abusive conduct. Brown referred to me as a "lucky mother-fucker" and said that he was tired of this mother-fucker. He also said that I reminded him of his little girl.

J. I was also abused and harassed by other white employees. Two white glass fitters that I knew as Ron and John and a repairman named Russ kept calling me an asshole and mother-fucker. A white employee named Porter called me an asshole and told me to think about that when I am preaching.

K. I saw large posters at work and on the assembly line which referred to me and my race. One poster read "Mark sucks" and the words "Darky Marky" were written on another poster. The words "Dark Mark, the All-American Loudmouth" was placed on a poster of a black basketball player. These posters were displayed at work.

L. There was also graffiti at the plant which referred to me and my race. In the bathroom, the words "Dark Mark sucks" was written on a stall. After I was transferred, I saw other graffiti which said "Good-bye Mark Turner" and "We won, Mark Turner."

M. In addition to the offensive, profane and obscene language directed at me by white co-employees, pornographic material would be placed at my work station. Pornographic material was placed there by white employees, Estes and Cameron. I complained about this to my supervisor.

These and other incidents occurred after Ringer was reinstated. The Company took no

effective action to prevent the abuse and harassment." (Turner Aff. at para. lO).

The ongoing and continuous abuse plainly constituted an "unreasonably abusive or offensive work environment.

Moreover, Turner was aware of other discriminatory practices in the department. (Turner Aff. at para. 15). In one particular incident, Gabriel Artis, a black employee, was punched by a white employee. Though the supervisor was aware of the assault, the white employee was not disciplined. Tiffany Williams' Affidavit details the abuse and harassment she suffered from some of the same white employees who abused and harasseTurner. James Smith testified that other black employees complained of racial harassment by Supervisor Brown. Turner watched Supervisor Brown order black employees to turn down or shut off music listened to by black employees. He heard stories about a picture of a black man with a noose tied around a black penis stating this is the solution to the nigger problem and white employees wearing Ku Klux Klan hoods in the parking lot. This and other discriminatory conduct in the department should be considered. See Stinglev v. Arizona, 796 F. Supp. 424 (Ariz.

1992) ("The abusive conduct which creates the hostile environment need not be directed toward the plaintiff specifically." 796 E. Supp. at 428). In Vance v. Southern Bell Telephone and Telegraph Co., 863 F.2d 1503 (11th Cir. 1989), the court explained:

> "...an actionable harassment claim must establish by the totality of the circumstances, the existence of a hostile or abusive working environment which is severe enough to affect the psychological stability of a minority employee. The prima facie showing in a hostile environment case is likely to consist of evidence of many or very few acts or statements by the defendant which, taken together, constitute harassment. It is important to recognize that in assessing the credibility and weight of the evidence presented, the jury does not necessarily examine each alleged incident of harassment in a vacuum. What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents." 863 F.2d at 1510.

Quoting the Sixth Circuit decision in Davis, the court added:

> "We stress also that the determination of whether the defendant' s conduct is sufficiently severe and pervasive' to constitute racial harassment does not turn solely on the number of incidents alleged by the plaintiff. In a recent hostile environment harassment case, the Sixth Circuit explained that drawing a formal line between `isolated incidents' and a `pattern of

harassment' is not helpful to the analysis:

> `[T]he plaintiff need not prove that the instances of alleged harassment were related in either time or type. Rather, all that the victim of racial harassment need show is that the alleged conduct constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to do his or her job.'" 863 F.2d at 1510, 1511.

In that case, the appellate court held that plaintiff'5 evidence was sufficient to create a jury question even though the plaintiff cited only a few incidents of harassment.

The numerous acts of harassment here constitute "an unreasonably abusive or offensive work-related environment" and is actionable under Davis. At the very least, the evidence is sufficient to present a disputed issue of fact on this question.

B. The Employer Knew Of The Harassment.

Under Davis, Plaintiff Turner must also show that the "employer knew or should have known of the alleged conduct". That showing was clearly made here.

Plaintiff'5 Affidavit states that he informed his supervisor of each incident. Notification to the supervisor is sufficient to trigger the employer's duty to take prompt remedial

action to end the harassment. Davis v. Tri-State hack Distributors. Inc., 981 E.2d 340, 343 (8th Cir. 1992). Turner also spoke with the Company's EEO Supervisor and upper level managerial employees in the Company's Labor Relations Department and complained that he was being harassed because of his race and religion. And, Union Representa~~~ Smith advised Testa of the problem. The Company does not dispute that it was fully aware of the incidents or deny that Turner advised management officials that the harassment was motivated by racial and religiou5 considerations.

C. **The Company Failed To Take Prompt Remedial Action To End The Harassment.**

In Snell v. Suffolk Countv, 782 F.2d 1094 (2nd Cir. 1986) the court explained that once an employer has knowledge of a racially combative atmosphere in the workplace, he has a duty to take reasonable steps to eliminate it." 782 F.2d at 1104. Under Davis, Turner must also show that there is a factual issue with respect to the adequacy of the Company's response to the harassment. The Company's response to the harassment of Turner was plainly inadequate.

The Company did not take meaningful remedial measures

to prevent the harassment.

- David Estes, a white co-employee who made unwelcome homosexual remarks with racial overtones to Plaintiff Turner was not disciplined in any way.

- Jeff Ringer, who assaulted Mark Turner, was reinstated with a one-week loss of pay, and his record was cleared of the discipline. The failure to meaningfully discipline Ringer for assaulting Turner was especially significant since the supervisory employees recommended Ringer's termination. Moreover, when white employees were the victim of less serious offenses the wrongdoer received far greater punishment.

- The Company did not locate or punish the individuals who vandalized Plaintiff Turner's automobile. Though acknowledging that it was an appropriate matter for security, General Motors managerial employees did not refer the matter to security.

The Company did not discipline employees John Karash, Carl Cononico, and Ken Click for threatening Mark Turner. The Company did not even ask employee Cononico about the threat. The failure to provide any

discipline is especially significant since Turner was suspended and transferred when a white employee falsely stated that he was threatened by Turner.

The Company did not locate and punish the

> employees who placed the snake at Turner's work station, vandalized his car, or placed racial graffiti in the laboratory or posters at work. The employees who worked with Turner were not even asked about the various incidents. The Company made no effort to halt the harassment by locating and punishing the wrongdoers. In fact, the racially offensive posters that were turned over to Greg Brown have disappeared. Brown claims that one was stolen from his office, but he did not report the theft to Plant Security. Brown turned the other poster over to Labor Relations Specialist John Brincko. Brincko lost that one. So much for a thorough investigation by General Motors.

The Company took no meaningful action to prevent the harassment of Mark Turner.

In Daniels v. Essex Group. Inc., 937 F.2d 1264 (7th Cir. 1991), the court held that the company's efforts to halt the harassment was insufficient. The opinion states:

> "This Court has repeatedly recognized that an employer will be liable for discrimination by an employee 1 if the employer knew or should have known about an employee's acts of harassment and fails to take appropriate remedial action.' Brooms, 881 F.2d at 421." 937 F.2d at 1275.

The court continued that the company' s remedial actions were

insufficient:

> "In addition to dragging its feet on responding to the discrete acts [of harassment], the defendant made virtually no effort to investigate the incidents, nor did Essex independently warn employees verbally or in writing that racial harassment would not be tolerated in the workplace." 937 F.2d at 1275.

Here too, General Motors made "virtually no effort to investigate the incidents." Nor did the Company warn employees that harassment would not be tolerated. To the contrary, the Company allowed employees to subject Turner to abuse and harassment and made no serious efforts to identify and punish the responsible employees.

The evidence presented here by Plaintiff Turner is sufficient to establish a claim under Davis. There are issues of fact with respect to the Company's condoning a hostile work environment and a summary judgment is simply not appropriate.

The Company disagrees. General Motors argues that Turner cannot establish a claim against General Motors based on alleged harassment by co-workers because he cannot prove that the acts were racially motivated, that the harassment was so pervasive as to create a racially hostile environment, or that General Motors

condoned the actions." (Brief at p. 28). General Motors adds that Plaintiff cannot show that "other black employees who worked with Plaintiff...were mistreated or complained of mistreatment." (Brief at p. 35). The Company is wrong on all counts.

The Company first argues that "there is no evidence that the co-worker' s actions were motivated by Plaintiff's race or religious beliefs." (Brief at p. 28). The argument is contrary to the evidence and the Company's own actions.

First, discriminatory animus is evident in the graffiti and posters. References to "Dark Mark" and "Darky Marky" are obviously racial. Also, the posters are compelling evidence that other acts of harassment occurring at the same time were also motivated by Plaintiff's race.

Turner repeatedly told General Motors supervisory officials that he was being threatened, harassed and abused because of his race and religion. Again, his Affidavit states:

> "12. I repeatedly advised General Motors supervisory officials that I was being threatened, abused and harassed because of my race and religion. I told Labor Relations Specialist Brincko and EEO Supervisor Testa

> that I was being harassed because I was black and a Christian. When I advised them that Cononico had threatened me, they told me to talk to a union official. I told Brincko that he was biased and insensitive to my civil rights. I reminded Brincko that General Motors had discharged an employee for harassing a white woman and had suspended Estes for swearing at white co-employee Ligouri, and was therefore practicing a double standard by failing to prevent the threats and harassment of me by white co-employees. I made General Motors officials aware that the abuse to which I was subjected was based on white employees' hostility to my race and religion." (Turner Aff. at para. 12).

Also, Turner was warned by a black supervisor that he was being endangered by white employees in his department.

The Company recognized that Turner was targeted for harassment because of his race. Turner was referred to the EEO Supervisor after his automobile was vandalised. Labor Relations Specialist Brincko explained why Turner was sent to the EEO Supervisor:

> "Well, Mark is a black man, okay. That you know. In all honesty, that's the reason." (Brincko Dep. at p. 26).

The Company's present posture - that Turner was not harassed because of his race - is belied by its own conduct.

The sole authority cited in support of this argument is Bako v. Gordon, Case No. 1:89 CV 1529 (N.D. Ohio, 1991), appended

to Defendant's Brief. In that case, the harassment claim was grounded on two derogatory remarks. The court held that the reference to plaintiff as "flaky" and a "no-brainier" did not constitute racial harassment. Here, there were no isolated remarks, but a sustained pattern of abuse and harassment. Moreover, unlike Bako, there were several incidents which clearly had racial implications. The decision involving two neutral comments cannot fairly be read as barring a claim by an employee who is subject to a long campaign of harassment, where some of the incidents had clear racial implications, and where the company referred the matters to its EEO office which handles claims of racial discrimination.

Plaintiff Turner expressed his belief to Company supervisors that he was being harassed and abused because of his race and religious beliefs. Union Official Smith spoke with Testa about these racial problems. And, the Company apparently agreed since Turner was referred to the EEO office. Under these circumstances, there is at least an issue of fact concerning the racial motivation for

the harassment.

In Johnson v. General Motors Corp., 692 F. Supp. 1003 (D.C. Wisc. 1987), the plaintiff was a black employee who complained about vandalism and destruction of her work area. The defendant moved for a summary judgment. While the court questioned, "whether there is sufficient evidence to convince a factfinder that the harassment was racially motivated", 692 F. Supp. at 1006, the court denied the summary judgment motion with this explanation:

> "...plaintiff has at least created an issue of fact as to whether the employer knew about the racial motivation of the perpetrators. Although not dispositive, the fact that plaintiff expressed her belief almost immediately that the destruction of the bench was racially motivated is important. More significant is the fact that plaintiff's supervisor expressed agreement with that sentiment..." 692 F. Supp. at 1007.

Here too, Plaintiff complained that the harassment was motivated by discriminatory reasons, and the Employer initially agreed since Turner was referred to the EEO Supervisor.

Apparently, the Company believes it had no duty to act unless Turner's harassers used explicitly racial language. The

notion that only racial epithets are remediable is contrary to general principles of discrimination law, and settled precedent. First, it is well settled that the Civil Rights Act "tolerates no racial discrimination, subtle or otherwise. McDonnell-Dou~as C~. v. Green 411 U.S. 792, 801 (1973). Moreover, a civil rights plaintiff need not prove his claim by direct evidence. United States Postal Service_v. Aikens, 460 U.S. 711, 714, note 3 (1983). Defendant Company's notion that a black employee can be harassed if the aggressor merely omits reference to the victim' s race would undermine the purpose giving rise to the Civil Rights Act.

In Turner v. Barr, 811 F. Supp. 1 (D.D.C. 1993), the court explained:

> ...the harassment need not take the form of incidents with clearly racial or religious overtones; `any harassment or other unequal treatment of an employee' caused by the race or religion of the employee may create a violation of Title VII. See McKinnev v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985)." 811 F. Supp. at 2.

Other courts have similarly recognized that unlawful harassment need not be expressly discriminatory to support a Title VII claim. See, e.g., Daniels v. Essex Group Inc., 937 F.2d 1264 (7th Cir. 1991) ("Even

though the physical threat by Art was not specifically racial in nature, it may be considered as a predicate act in establishing racial harassment in a hostile work environment, because it would not have occurred but for the fact that Daniels was black." 937 F.2d at 1273), Vance v. Southern Bell Telephone & Telegraph Com~ny, s~ (Court finds that

laintiff was the victim of racial harassment based on evidence that a noose was twice hung at her work station). There is sufficient evidence that Plaintiff would not have been harassed except for his race and religious views and this evidence precludes a summary judgment even if some of the incidents werenot obviously racial. Defendant Company next argues that "the complained of conduct was not pervasive." The argument is frivolous.

In the period of several months, Plaintiff Turner was subjected to the following:

- A co-employee made sexual advances to Turner. The co-employee was not disciplined. Another co-employee assaulted and injured Turner. The co-employee was given a one-week suspension and his record was cleared.

- A dead snake was placed in Turner's work area.

- The tires of Turner's automobile were slashed in the General Motors parking lot.

- The lug nuts on the wheels were loosened while the car was parked in the General Motors lot.

- Turner was threatened by white co-employee John Karash.

- Turner was threatened by white co-employee Carl Cononico.

- Turner was threatened by white co-employee Ken Click.

- Turner was subjected to verbal abuse by white employees Earl Thompson, Russ Howard, and several others.

- Graffiti was written in the bathroom which read "Dark Mark sucks."

- Three posters were placed in the work area which read "Mark sucks", "Darky Marky" and "Dark Mark, the All American Loud Mouth."

- Pornographic material was placed in Turner's work station.

The superintendent called Turner a "mother fucker" and co-employees used profane language in referring to him.

A more pervasive atmosphere of harassment would be hard to envision. In the Erebia ChryslerPlastic_Products Corp, 772 F.2d 1250 (6th Cir. 1985) decision cited by General Motors, the appellate court affirmed a jury verdict in favor of plaintiff in a case involving comparable harassment.

In Davis v. Monsanto Chemical Co., su~, the Sixth Circuit explained that drawing a formal line between "isolated incidents" and a "pattern of harassment" is not helpful to the analysis. Referring to this decision, the court in Vance v. Southern Bell Telegraph & Telephone Co., ~a, explained:

> "It is thus incorrect to apply mechanically an absolute numerical standard to the number of acts of harassment which must be committed by the defendant before a jury may reasonably find that a hostile work environment exists." 863 F.2d at 1511.

Here, there was ample evidence to establish that the harassment was pervasive and a summary judgment on that basis is plainly inappropriate.

- Defendant Company next argues that "...plaintiff's harassment claim also fails because General Motors responded adequately to the racially offensive materials." (Brief at p.

33). The claim that the Company took appropriate action to end the harassment is simply not true.

Under Davis, the employer must take "reasonable steps under the circumstances to correct and/or prevent racial harassment..." 858 F.2d at 349. In this case:

- General Motors made no serious effort to discover and discipline the employees who were harassing Plaintiff Turner. The Company did not refer the matter to security although a General Motors official testified that it was and appropriate matter for security. General Motors did not investigate or even ask employees whether they had knowledge about the incidents.
- When the employees who were harassing Turner were identified, the Company failed to impose reasonable discipline. Estes made homosexual remarks with racial implications to Plaintiff Turner. He was

not disciplined. Ringer assaulted and injured Turner. He received a one-week suspension.

- **Cononico threatened Turner. Though Turner reported this incident to the Company, Cononico was not even asked about the threats. John Karash and Ken Click also threatened Plaintiff at work. They were not punished. Other employees who verbally abused Turner were not disciplined.**

- **General Motors never told Turner's co-employees that the Company would not tolerate aiid would punish employees who harassed Plaintiff.**

A jury could well find that the Company did not take "reasonable" steps to correct the environment. Reasonableness is generally not an appropriate issue for a summary judgment, and the determination of whether the Company's response was reasonable should be determined by the trier of facts. See Johnson v. General Motors Corp., sub Conye v.at. of Human Resources of State of Ge~ia, 787 F. Supp. 1434, 1444 (Ga. 1992), Rochon v. Attorn~ General, 734 F. Supp. 543, 547 (D.C. D.C. 1990).

In addition to failing to punish any employee who harmed Plaintiff, it should be noted that General Motors suspended and

transferred Turner for allegedly threatening a co-worker. In the Erebia decision, the Sixth Circuit upheld a jury finding in favor of the plaintiff in a hostile work environment case. In the course of the Opinion, the court explained:

> "Management was aware of plaintiff's many complaints of harassment and condoned the situation by taking no steps to improve conditions and by seeking to intimidate plaintiff. No showing that it received complaints from white supervisors of harassment by minorities and responded differently is required. However, we observe that management, through Ferguson, did investigate a complaint presented to him by a white employee against Erebia in regard to the incident with Baum. There was no investigation of plaintiff's complaints,..." 772 F.2d at 1258.

Here, the Company took no steps to discipline employees for abusing and harassing and threatening Plaintiff Turner, but did suspend and transfer Turner based on a false claim that he threatened an employee. As in Erebia, a jury could well conclude that the Company failed to take appropriate steps to correct the work environment to which Turner was subjected.

The Company did tell Estes to "knock it off" and made several other feeble attempts to end the harassment.* A jury could find that the minimal steps taken by the Company to end the

* When threatened by Cononico, Plaintiff was referred to the Union by Company officials. (Turner Aff. at para. 12). The Company, of course, cannot delegate its responsibility to insure that employees are not subjected to a hostile work environment. In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court expressly rejected the employer's argument that "the mere existence of a grievance procedure. .coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability" in a harassment case. 477 U.S. at 72. It should be noted that Turner did file a grievance over the harassment. The Union investigation revealed racial problems in the department and Testa was so advised. (Smith Dep. at p. 99). Also, the Company settled a grievance filed by Turner by promising to "make every effort not to harass employee in the future." (Bowers Dep. at p. 10). The Company did not honor this grievance settlement.

harassment were not sufficient. In Hansel v. Public Service Co. of Colorado, 778 F. Supp. 1126 (Col. 1991), the court explained that "not every response by an employer will be sufficient to discharge its legal duty. 778 F. Supp. at 1132. The court continued:

> "The response must be reasonable under the totality of the circumstances. What is appropriate remedial action necessarily depends on the particular facts of each case with focus upon the severity and persistence of the harassment and the effectiveness of any initial remedial steps. See, Ellison v. B~, 924 F.2d 872, 882 (9th Cir. 1991), (Title VII requires more than a mere request to refrain from discriminatory conduct and courts may take into account a remedy's ability to deter. `Employers send the wrong message to potential harassers when they do not discipline employees for sexual harassment'); DeGrace v. Rumsfeld, 614 F.2d

796, 805 n. 5 (1st Cir. 1980), (`more than mere verbal chastisement of those employees who used racial epithets was needed in order for [the defendant] forcefully to convey the message that racism would not be tolerated')." 778 F. Supp. at 1132.

The conduct of Defendant Company was plainly not adequate.

In Hansel, the employer' s response consisted on discussions with several employees. The company claimed that the response was sufficient and noted that the physical harassment had ceased. The court disagreed, explaining that the company' s response was insufficient. The court explained:

"Here, because the overt, physical harassment stopped, PSC argues it took appropriate remedial action in 1983 when it merely discussed Hansel's allegations with four of her coworkers. PSC misconstrues the nature of the remedial action required of it by Title VII under the circumstances of this case.

A hostile work environment is like a disease. It can have many symptoms, some of which change over time, but all of which stem from the same root. The etiology in this case is pure gender bias.
PSC may have attempted treatment of one symptom of the hostile environment, the physical abuse, but it failed completely to remedy the disease of hostile work environment. Moreover, the sexual harassment here was so egregious that merely `discussing' the matter with four of the perpetrators cannot reasonably be calculated to halt the

harassment. Indeed, the hostile environment continued unabated after 1983." 778 E. Supp. at 1132.

Here too, Defendant Company made no effort reasonably designed to end the harassment. The abuse of Turner was not halted by the Company. Obviously, the Company's efforts were unsuccessful under the circumstances:

- Estes has been suspended for 30 days for calling a co-employee an "asshole". He was not disciplined at all for making unwelcome homosexual overtures with racial overtones to Plaintiff. Would the Company's action discourage Estes from harassing Plaintiff?

- Ringer assaulted and injured Plaintiff Turner. He only lost a week's pay and his record was cleared. Would this really deter future assaults? In this regard, it should be recalled that Gabriel Artis, a black summer worker in the department, was punched by a white co-worker who was not disciplined at all although Estes had been suspended for thirty days after he bumped into a white employee.

- Employees Click, Cononico and Karash threatened Plaintiff Turner. They were not disciplined, though Turner was suspended and transferred for supposedly threatening a co-employee. What is the message communicated to the employees by the Company's response?

- White employees in the department were aware of the harassment. They also knew that the Company did not even inquire as to whether they had information concerning the incidents. Again, why should the employees believe the Company was serious about correcting the situation?

The Company's feeble attempt was plainly not designed to end the harassment and did not end the harassment. Under these circumstances, a summary judgment is inappropriate.

The Company argues that Bell v. St. Reds Paper Company Container Division 425 F. Supp. 1126 (N.D. Ohio, 1976) is "Of particular pertinence..." (Brief at p. 34).* In that case, the Court found that "Defendants responded swiftly and reasonably to Plaintiff's claims of harassment." 425 F. Supp. at 1137. The Court explained that the Company:

> "...sought to remind its employees of company rules on the subject of harassment and posted a short letter agreement between itself and the Union regarding contractual clauses prohibiting discrimination in its plant." 425 F. Supp. at 1130.

Also, "[the general plant manager] thought it was necessary in view of the general racial climate at the time to call in the services of someone he considered an expert in such matters."

425 F. Supp. at ,1129. Here, Defendant General Motors did not take similar steps. The Company did not meet with its employees or otherwise advise them that racial harassment would not be * Defendant Company also relies on Bell v. Chesapeake & Ohio Railwaycompany, 929 F.2d 220 (6th Cir. 1991). In that case, the company did address the sporadic acts of harassment which occurred over a decade. Here, there were numerous acts over a period of a few months, many of whi.ch the Company did not even investigate. tolerated. And, General Motors did not call for the services of an independent expert. It should be noted that St. Regis was tried to the court. The case was decided on a full evidentiary record. Under the Company's own authority, this Court should not accept the Company's self-serving claim that it acted in a reasonable manner on a summary judgment motion. In sum, a jury could well conclude that General Motors condoned a discriminatory work environment. The failure to take appropriate steps to prevent the harassment and abuse of Turner makes the Company liable under the federal law discussed above. Defendant Company properly recognizes that Ohio civil rights laws track the federal act and a summary judgment would not lie with respect to Turner s discrimination claims under Ohio law.

II. TRANSFER OF TURFR WAS NOT AN APPROPRIATE RESPONSE TO T£ BOSTILE WORK ENVIRONMET TO WHICH TURFR WAS EXPOSED.

As explained above, Mark Turner was subjected to an ongoing campaign of harassment and abuse by white employees in the windowshield install department. General Motors officials were fully aware that Turner was targeted for abuse and harassment because of his race and religion, but took no meaningful steps to improve the hostile work environment. Rather than meeting its obligations under the Civil Rights Act, the Company transferred Mark Turner to a different department. Turner was then replaced by a white employee. (Turner Aff. at para. 13).*

In its initial argument, the Employer isolates the transfer and claims that Turner cannot prove that the transfer was motivated by racial considerations. Defendant Company innocently argues that .plaintiff was moved because of concern for his safety and welfare arising from his run-ins with co-workers in the windshield area." (Brief at p. 23). The argument disingenuously neglects to mention that it was Defendant Company which invited and then took no meaningful steps to prevent the hostile and dangerous environment

which is cited as the basis for the transfer. In effect, Defendant Company relies on its failure to comply with the Civil Rights Act to justify the transfer of Mark Turner.

The Company previously attempted to induce Turner to transfer voluntarily. A black supervisor was recruited to warn Turner about the dangerous propensities of white employees in twindshield install area and to encourage Turner to transfer to a different position. Turner refused. After Turner was threatened by Click, the Company involuntarily transferred Turner to another department supervised by Jim Mass, a black Baptist Minister. The transfer was improper, Turner protested and was returned to the windshield install department. In their brief, Defendant Company

Turner was transferred from his regular job and assigned new and different duties. While he was economically harmed by the move, it should be noted that a plaintiff need not show economic injury in a hostile environment case. Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986), St1n~y v. Arizona, et al 796 F. Supp. 424, 429 (Arizona, 1992).

represents that "...after two more incidents came to light, General Motors again moved him out of the area." (Brief at p. 8, footnote 8). The Company refers to page 48 of the Brincko deposition.

The two incidents referred to in the Brincko Deposition involved verbal abuse of Turner by a white co-worker and threatening remarks to Turner made by another white employee. Rather than disciplining the employees who threatened and abused Turner, the Company chose to involuntarily transfer Turner to Mass' department. The Company used the misconduct of white employees as an excuse to justify the transfer of Turner from the windshield install area.

This is not the typical Title VII action where a plaintiff seeks relief as a result of a specific employment decision. Mark Turner was subjected to abuse, threats and harassment by white co-employees. The Company failed to ta meaningful steps to eliminate the hostile work environment. Rather, the Company sought to accommodate the wrongdoers and transfer the innocent Turner. It is the events leading up to the transfer as well as the transfer itself which gave rise to this action. Defendant Company cannot isolate the transfer decision without acknowledging its responsibility for the conditions leading up to the transfer. That is precisely what Defendant Company attempts in its initial argument.

Defendant Company engages in a lengthy discussion of the pattern of proof in employment discrimination cases. The Company discusses a variation of the McDonnell-Douglas formula. That analysis is used to prove employment discrimination in cases where there is no direct evidence of discrimination. Hatcher v. Greater Cleveland Reulonal Transit Authori~, 746 F. Supp. 679, 684 (N.D. Ohio, 1989). A threshold issue is whether the test is even applicable here.

First, this case involves the Company's creation and failure to end a hostile work environment. The McDonnell-Douglas analysis is "inappropriate in the harassment situation." Moffett v. Gene B. Glick Co.. Inc., 621 F. Supp. 244, 266 (Ind. 1985). The transfer should be viewed as the failure of the Company to take appropriate action in response to harassment of Turner andwas inappropriate under the law discussed above.

Further, there is direct evidence here. Turner's Affidavit states: 13 Rather than acting to prevent thehostility threats and abuse of me by white employees, General Motors transferred me to a new department. , I was replaced by a white college student. I was assigned to work under

Supervisor Jim Mass. I had earlier been encouraged to transfer to Mass' department

because he is black and a fellow Baptist

> Minister. I refused because I was familiar with the windshield install department and did not want to surrender to discriminatory conduct. When I was involuntarily transferred, Brincko told me that I was to work under Jim Mass because Mass shared my race and religion. He also referred to another black Christian in Mass' department. In transferring me, Brincko repeatedly emphasized my race and religion. Brincko told me if I protested the transfer I would be disciplined. I objected to the transfer and spoke with Jack Roberts, Manager of Industrial Relations. I informed him that there was no basis for the transfer and the excuse offered by the Company was just a pretext. I stated further that management was showing a racially biased attitude by transferring me rather than
>
> preventing the harassment and threats."
> (Turner Aff. at para. 13).

The Company was motivated by racial and religious considerations in transferring Turner. The Company consciously sought to move Turner to a department where the supervisor was a black Baptist Minister. And, the only black employee permanently assigned to the windshield install area was removed. A summary judgment would not be appropriate even if the transfer is viewed in isolation rather than as part of the harassment claim. There is sufficient direct evidence of discrimination, and this Court need not consider the method of proof in cases where there is no direct evidence of

discrimination. In any event, the black Turner was replaced by a white employee and a prima facie case would be present if McDonnell Douglas was applicable.

In the course of this argument, Defendant Company asserts a series of meritless claims which can be quickly dismissed.

Defendant Company argues that "...there was no similarly situated white employee and thus none who received dissimilar treatment." (Brief at p. 22). The evidence submitted by Plaintiff Turner, which must be accepted as true at this stage of the proceeding, establishes that a number of Turner's co-employees engaged in improper conduct. They were not transferred or disciplined in any way. It should be recalled that Turner was originally involuntarily transferred to Mass' department for allegedly threatening Click. Click and other employees who threatened Turner - including John Karash and Carl Cononico - were not transferred.

Defendant Company, in its search for some justification, claims that Turner was involved in more incidents than the other employees. A real distinction, not cited by the Company, is that Turner was wholly innocent and the white employees who threatened and abused

him were not. By transferring Turner, the Company rewarded the wrongdoers at the expense of their victim.

Defendant Company continues that "...plaintiff cannot make the required showing of a `causal connection' between plaintiff's race and his move." (Brief at p. 23). Again, Turner's Affidavit states that he was told by General Motors Supervisor Brincko that he was being transferred to another department because of the race and religion of the supervisor. The Company considered race and religion in making the transfer decision.

Defendant Company states that Turner was properly transferred because of an "inability to get along with others in the windshield area,..." (Brief at p. 24). The argument misses the point. Under such an analysis, an employer could justify the transfer of a black employee merely because white employees refused to work with him. An employer may not accommodate the racial biases of its employees and must do more than determine who can `get along with others". Under the Civil Rights Act, an employer cannot tolerate and reward discrimination by agreeing to white employees' refusal to work with a black employee. That is precisely what occurred here. The transfer removed the only black

employee permanently assigned to the windshield install area. The unknown author of the graffiti stating "Good bye, Mark Turner" and "Mark Turner, we won" provided a testimonial to Defendant Company's efforts to accommodate white employees who harassed Turner.

Defendant Company concludes that "...neither plaintiff's race nor his religion had anything to do with General Motors decision to move him." (Brief at p. 27). The argument is mistaken and undermined by the Turner Affidavit discussed above. In transferring Plaintiff Turner, the Company cited the race and religion of the new supervisor.

Again, in isolating the transfer, the Company ignores the essence of this action. No transfer would have been required if the Company had discharged its obligations under the Civil Rights Act and taken appropriate action to prevent the hostile work environment. Rather, the Company did not take appropriate action and permitted the abuse of Turner. General Motors should not be allowed to profit by its own misconduct and to justify the transfer by citing the hostile work environment which the Company improperly permitted.

III. TURNERS RETALIATION CLAIMS SHOULD~ NOT BE DISMISSED.

Plaintiff Turner was subjected to harassment by General Motors supervisory personnel after he filed a discrimination charge. Turner's Affidavit states:

> "14. After the involuntary transfer, I filed discrimination charges against General Motors. General Motors retaliated against me for filing the charges. I was transferred from department to department and required to perform new and different duties. This is unusual at General Motors. I was more closely scrutinized on the job, subjected to continuous supervision, and repeatedly warned that if I made any mistake I would be disciplined. This ongoing and zealous scrutiny never occurred until I filed a discrimination charge. General Motors did not adequately train me for the new job and I received a disciplinary layoff for poor job performance. General Motors Supervisor Gasperick, who is white, often referred to the discrimination charges against General Motors in conversations with me. Because of the stress caused by the harassment, I was reporting to medical on occasion. Gasperick ordered me to stop. I was screamed at by Labor Relations Representative John Brincko for inadvertently attempting to park in the wrong parking space. I was told not to use a common walkway near a white employee who falsely accused me of bothering her." (Turner Aff. at para. 14).

The Company's retaliatory conduct is actionable under Title VII.

29 U.S.C. Section 2O00e-3 provides, in relevant part:

"It shall be an unlawful employment practice for an employer to discriminate against any of

his employees. .because he has made a charge...under this title."

The retaliatory conduct described in Turner' s Affidavit gives rise to a claim under this provision.

The retaliatory acts listed in the Turner Affidavit are sufficient to establish a claim under this Section. Defendant Company complains that "...plaintiff cannot establish a prima facie case of retaliation with respect to his move. Plaintiff did not file his discrimination charge until November 1, 1990 after he had been moved." (Brief at p. 36). The argument ignores the fact that after the initial transfer, Plaintiff Turner was constantly moved to other departments, subjected to close 5llrveillance, and ~~peatedly warned about future discipli~~ Again, the Turner Affidavit states:

> "14. .1 was transferred from departme~~ to departme~~ and required to perform new and different duties. This is unusual at General Motors. I was more closely Scrutinized on the job, 5ubjecte~ to continuous supervisi0~, and repeatedly warned that if I mad: any mistake I would be discipli~~ This ongoing and zealous scrutiny never occurred until I filed a discrimination charge." (Turner Aff. at para. 14).

The transfers of Turner after the discrimination charge precluded him from learning his job and Subjected him to discipline The scrutiny ~0mplain~~ of in the Affidavit support5 a retaiation charge. See, e.g., Reyes v Mathews, 428 F. Supp. 300 (Col. 1976) ("The reprisal.~00~ the form of increased upervisi0~, 5llrveillance and unnecessary checking on plaintiff'5 activities, belittling and finding fault by his superviso~~ 428 F. Supp. at 301). The increased scrutiny of Turner occurred shortly after filing discrimination charge5 and a jury could well determine that the Company15 actions were in response to the discrimination charge.

The Turner Affidavit continues:

> "14. ...General Motors Supervis0~ Gasperi~~, who is white, often referred to the discrimination charge5 against General Motors in conversations with me. Because of the stress caused by the harassment, I was reporting to medical on occasion. Gasperi~~ ordered me to stop. I was screamed at by Labor Relations Representa~~~ John Brincko for ~~advertently attempting to park in the wrong parking space. I was told not to use a common walkway near a white employee who falsely accused me of bothering her." (Turner Aff. at para. 14).

Defendant Company suggest5 that Gasperick'5 and Brincko'5 comments were appropria~~ and not motivated by the discrimination

charge. A jury should determine whether Gasperic~'5 repeated reference to the discrimination charge, and whether Brincko's yelling at Turner for an innocent mistake, were appropria~~ conduct or motivated by

the EEOC complains Summary judgment should not be granted with respect to Turner's retaliation claims.

IV TURNERS STATE LAW CLAIMS SHOULD NOT BE ~ DISMISSED ON A SUMMARY JUDGEMENT

In addition to discrimination claims, the complaint also asserts state law tort claims against Defendant General Motors and Ringer. Defendant Company seeks a summary judgment dismissing the claims asserted against the Company, but not Defendant Ringer. The Company's arguments with respect to the state law claims are without m erit.

A. Respondeat Superior Attaches To The Actions Of General Motors' Employees Under Ohio Law.

General Motors' claims that under Ohio law respondeat superior does not attach to the assault and racial harassment of Turner by its employees. The Company argues that it cannot be held liable for the acts of its employees allegedly committed outside the

course and scope of their employment. This, however, is an incomplete analysis of the issue. In Ohio, an employer can also be held liable under the doctrine of respondeat superior when it ratifies the conduct of its employees, even if the employees are acting outside of the normal course of employment. Finley v. Schuett, 8 Ohio App.3d 38 (1982), Hester v. Church's Fried Chicken, 27 Ohio App.3d 74 (1986). When viewed in a light most favoraleto Turner, the evidence is sufficient to establish a actual issue with respect to whether General Motors ratified its employees' actions.

General Motors' response to the harassment of Turner was practically nonexistent. Time and again, when one of Turner' s co-employees harassed him, General Motors simply shrugged its corporate shoulders and allowed the harassment to continue:

- David Estes made homosexual remarks to Turner. General Motors took no disciplinary action after Turner complained to a supervisor. General Motors later suspended Estes for similar offensive language directed at a white employee.

- Jeff Ringer assaulted Turner. Despite the fact that three supervisors concluded that Ringer's actions should have

resulted in discharge, Ringer was reinstated and all mention of the incident was deleted from his record.

- After seeing that no discipline would result for harassing Turner, General Motors' employees began a series of harassments. A dead snake was left at Turner's station. Estes thoughtfully drew Turner's attention to it, stating "Look, we got something for you." Although this was reported to Turner's supervisor, Turner's co-employees were not questioned about this.

- Turner's car's tires were slashed and the lug nuts loosened. Security made no attempt to help Turner, or to investigate either incident. None of Turner's co-employees were questioned.

Racist graffiti and posters aimed at Turner began to appear at work. General Motors again made no attempt to determine who was responsible. None of the

co-employees were questioned about these incidents.

- Three of Turner's co-employees, John Karash, Carl Cononico, and Ken Click, verbally abused and threatened Turner. This conduct was reported to Turner's supervisors, but General Motors took no action at all against two of the co-employees. The third was originally suspended, but the discipline was later cleared from his record and he was given full back pay.
- Although the white employees who

threatened Turner were not disciplined, Turner was disciplined.

- Other employees, including Earl Thompson and Russ Howard, cursed Turner in language similar to language that, when directed at a white employee, was considered grounds for discipline. Despite the fact that Turner's supervisor was actually present when some of these incidents occurred, Thompson and Howard were never disciplined. Indeed, Turner's supervisor referred to Turner as a "mother fucker."

This long history of utter indifference to its employees' harassment of Turner is sufficient evidence to establish General Motors' ratification of the acts of its employees.

In Pusateri v. E.F. Hutton & Co.. Inc., 225 Cal. Rptr. 526 (Cal. App. 1986), the court noted:

> "(F)ailure to dismiss an employee after the commission of oppressive acts is evidence of ratification if the managing agent had knowledge of, or the opportunity to learn of, the misconduct and fails to investigate." 224 Cal. Rptr. at 529.

State courts have found that an employer ratified the conduct of its employees where, as here, an assault occurred and the

assaulting employee was not discharged, Greenfield v. Spectrum Inv. 219 Cal. Rptr. 805 (Cal. App. 1985), and, where the employer has failed to take corrective action despite knowledge of illegal activity. Hart v. National Mortg. & Land Co., 235 Cal. Rptr. 68 (Cal. App. 1987), (Knowledge of unwanted homosexual advances with no discipline resulting presents issue of ratification), Wirig v. Kinney Shoe Corp., 448 N.W.2d 526 (Minn. 1989), (employer ratified acts of employee by failing to discharge or reprimand for illegal sexual harassment), Busby v. Truswal Svstems Corp., 551 So.2d 322 (Ala. 1989), (Failing to take effective action after knowledge of possibility of illegal acts constituted ratification of those acts).

Here, General Motors ratified the assault by its employee Ringer by failing to discharge him despite the recognition that his assault justified discharge. Greenfield, -a. General Motors' complete indifference to its employees' harassment of Turner is evidence that it has ratified that misconduct as well. As in Pusateri, General Motors failed to investigate many of the instances of misconduct. As in Hart, Wi~, and B~, General Motors failed to discipline the

offenders, or take effective action to prevent or punish harassment, despite numerous and repeated occurrences that indicated a serious problem. There is evidence sufficient to allow a jury to find that General Motors ratified the actions taken by its employees. Therefore, General Motors' attempt to escape liability for these actions must be rejected.

right restricting transfers, that Turner is alleging. The intentional infliction of emotional distress claim is not preempted by the NLRA.

C. Turner Has Produced Evidence To Support The Intentional Infliction Of Emotional Distress Claim.

When the evidence is viewed in a light most favorable to Turner, it is clear that he states a case for intentional infliction of emotional distress. In recognizing the tort of intentional infliction of emotional distress, the Ohio Supreme Court explained the elements of the cause of action:

> "One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if

bodily harm to the other results from it, for such bodily harm." Yeager v. Local Union 20, 6 Ohio St.3d 369, syl. (1983).

The treatment to which Turner was subjected is the type of conduct that one knows or should know is likely to cause severe emotional distress. It went far beyond the scope of petty annoyances, and. constituted the sort of outrageous conduct the tort of intentional infliction of emotional distress was designed to combat. Contreras v. Crown Zellerbach C~., 565 P.2d 1173 (Wash. 1977), Howard Univ. v. Best 484 A.2d 958 (D.C. 1984). Thus, the elements of thetort of intentional infliction of emotional istress are established where evidence exists of continual harassment. Robinson v. Vitro Co~, 620 F. Supp. 1066 (D.C. Md. 1985).

The fact that Turner was a victim of a pattern of conduct, rather than an isolated incident, strengthens his claim. Isolated incidents that, standing alone, would not be sufficiently outrageous could, in context, be considered as outrageous behavior:

> "The flaw in Wenk's argument is that he isolates each individual incident and ignores the fact that the jury are entitled to draw reasonable inferences from the totality of circumstances.
>
> Repeated harassment,...may compound the outrageousness of incidents which, taken individually, might not be sufficiently extreme to warrant liability for infliction of emotional distress." Bovle v. Wenk, 392 N.E.2d 1053, 1055-1056 (Mass. 1979).

Here, there is evidence of a pattern of racial harassment sufficient to support a claim for the intentional infliction of emotional distress.

The abuse to which Turner was subjected was extreme. During the months prior to his transfer:

- Turner was subjected to obscene homosexual remarks by Estes.

General Motors also contends that there can be no liability for intentional infliction of emotional distress because neither General Motors nor its employees knew of Turner's supposed unsuceptiblity toracial harassment. The Company knew of Turner's previous psychiatric treatment (Turner Aff. at para. 16). In any event, the pattern of harassment shown by the evidence here presents

a jury issue as to whether or not a reasonable person should know that the conduct is substantially certain to cause emotional distress or that presents a high probability of emotional distress. Contreras, supra. That alone is sufficient. Clifton v. Van Dresser C~, 73 Ohio App.3d 202 (1991). Knowledge of a specific susceptability to racism is not required.

- Turner was assaulted by Ringer.

- Turner was physicallY threatened and verbally abused by several coworkers, including his supervisor who called him a "mother fucker."
- A snake was placed at his work station, and his automobile was vandalized on two occasions when it was parked at the Lordstown facility.

- A series of posters with racial slurs directed at Turner were placed in the work area.

- Racist graffiti appeared in the restroom.

General Motors is responsible for 5ubjecting Turner to this conduct. In addition to the respondeat superior theory argued above, General Motors is directly liable because its failure to effectivelY deal with the harassment led to the creation of a raciallY 0ffensive work environment. And, all the

retaliatory acts were committed by supervisory personnel. This is sufficient evidence to support a finding that General Motors itself committed the tort of intentional infliction of emotional distress. Contrera5, bra Robinson, bra. Since General Motors response to Turner s complaints of racial harassment was to ignore them and instead blame Turner, General Motors' conduct helped create the racially hostile atmosphere that led to the °infliction of emotional distress.

The Company claims that "plaintiff cannot show proximate cause of significant emotional distress. (Brief at p. 44). Turner s Affidavit states that General Motors was aware of his previous psychiatric treatment and that his emotional condition worsened as a result of the harassment. (Turner Aff. at para. 16). The Affidavit is supported by the expert testimony of Dr. Guy (Guy Dep. at 359-364, 370, 371) and Dr. Ariza (Ariza Dep. at 94, 95, 144-147). Dr. Ariza testified that the harassment of Turner at work "would greatly enhance his problems." (Ariza Dep. at 146). At the very least, an issue of fact is present on the issue of whether Turner's emotional problems worsened as a result of the hostile work environment.

work environment which the Company invited and took no meaningful action to prevent. Defendant Company has not shown that a summary judgment dismissing the discrimination and related state claims is appropriate and the motion for summary judgment should not be

granted. (v)

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B. **Turner's Intentional Infliction Of Emotional Distress Claim Is Not Preempted** Byr The National Labor Relations Act.

General Motors argues that the National Labor Relations Act (NLRA) preempts Turner's emotional distress claim. Once again, General Motors bases this argument on a complete misrepresentation of Turner's claim. General Motors posits that Turner is complaining about his transfer, that the transfer is governed by the collective bargaining agreement, and that a lawsuit over the transfer is preempted by the NLRA. The argument mistakes the nature of Turner's claim.

The evidence indicates that a prolonged period of systematic abuse was directed towards Turner. Despite knowing of this abuse, General Motors failed to discipline, or even investigate, this conduct. Instead

tors subjected Turner to working in an environment of racial prejudice and continued harassment. When General Motors finally did act, it transferred Turner rather than punish the guilty parties. Turner's former co-workers commemorated their victory by penning celebratory graffiti for which they were also not disciplined.

Turner is not claiming that the transfer alone caused him emotional distress. It is the background of the transfer, in the context of Genera] Motors' complicity in the racist harassment of Turner, that is the basis of Turner's intentional infliction of emotional distress claim. Under these circumstances, the compelling state interest in protecting its

citizens outweighs any tenuous connection with a collective bargaining agreement.

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The Supreme Court dealt with the relationship between the NLRA's preemption clause and intentional infliction of emotional distress cases in Farmer v. Carpenters, 430 U.S. 290 (1977). The Court held that the NLRA's preemption language was not absolute, and necessitated a balance between the need for a cohesive national labor policy and the need of states to protect the rights of their citizens. The Court noted:

"No provision of the National Labor Relations Act protects the 'outrageous conduct' complained of by petitioner Hill in the second count of the complaint. Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct on the part of union officers which is so outrageous that 'no reasonable man in a civilized society should be expected to endure it.'

The State, on the other hand, has a substantial interest in protecting its citizens from the kind of abuse of which HilL complained." 430 U.S. at 302, citations omitted.

Although the state cause of action for infliction of emotional distress could arguably touch on an area of primary federal concern, a tenuous connection does not counterbalance the legitimate and substantial interest of the

state in protecting its citizens. Thus, a claim of intentional infliction of emotional distress is not preempted by the NLRA if it is:

" ..either unrelated to employment discrimination or a function of the

, abusive manner ın which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself." 430 U S. at 305.

The Court concluded that the emotional distress claim was not

preempted.

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The Supreme Court revisited NLRA preemption of state claims in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). There, the Supreme Court held that a state tort action that required for its determination an interpretation of a collective bargaining agreement would be preempted. Otherwise, the state tort action is not preempted. This is because the state action protects rights that exist independent of the NLRA:

"...it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." 471 U.S. at 212.

Turner's intentional infliction of emotional distress claim is clearly based on a right independent of the collective bargaining agreement. Moreover, nothing in Turner's intentional infliction of emotional distress claim requires the interpretation of a collective barga

znt. In Knafel v. Pepsi-Cola Bottlers of Akron, Inc., 899 F.2d 1473 t6th Cir. 199O), the Sixth Circuit dealt with this issue. The plaintiff had alleged a pattern of harassment based on her participation in a Title VII lawsuit and the filing of a workers' compensation claim. The Court held:

"Knafel's alleged emotional distress was not a result of her termination, but rather of the abuse she claims to have endured while employed. This tort claim, like the claim in Dougherty ova. Parsec, Inc., 872 F.2d 766 (6th Cir. 1989) does not require an interpretation of the labor contract.

Whether Pepsi harassed Knafel so outrageously as to cause her emotional distress and physical injury is a question that the
court can decide without interpreting

.ining agreeme
the collective bargaining agreement." 899 F.2d at 1483.

Turner's intentional infliction claim should not be dismissed under Knafel.

The Knafel court held that the plaintiff could also bring a state law action protesting her discharge under the anti-retaliation provision of Ohio's workers' compensation statute, O.R.C. Section 4123.90. The Court noted that determining whether or not a discharge was in retaliation for the filing of a workers' compensation claim did not involve the interpretation of a collective bargaining agreement. It was a state created right independent of the collective bargaining agreement that was at issue. Although the factual inquiry might be similar, the language of the collective bargaining agreement was irrelevant to the issue of whether the

discharge was motivated by the filing of a workers' compensation claim.

The Company's intentional infliction of emotional distress due to the creation of a hostile work environment is not preempted, since the abuse Turner suffered while employed "does not require the interpretation of the labor contract." Knafel, supra. Moreover, in this lawsuit, it is irrelevant whether General Motors violated Turner's contractual rights by transferring him. Transferring Turner was discriminatory and the cumulation of the Company's creation of the hostile en JI-onment

In the parlance of Farmer, it Is the manner in which Turner's transfer was accomplished, not the transfer itself, that is at issue It is the state created right to be free from the intentional infliction of emotional distress, not a contractual 66
harassment. Robinson v. Vi ro Corp., 620 F. Supp. 1066 (D.C Md.

1985). *

The fact that Turner was a victim of a pattern of

conduct, rather than an isolated incident, strengthens his claim.

Isolated incidents that, standing alone, would not be sufficiently

outrageous could, in context, be considered as outrageous

behavior :

"The flaw in Wenk's argument is that he isolates each individual incident and ignores the fact that the jury are entitled to draw reasonable inferences from the totality of circumstances.

Repeated harassment,...may compound the outrageousness of incidents which, taken individually, might not be sufficiently extreme to warrant liability for infliction of emotional distress." Boyle v. Wenk, 392 N.E.2d 1053, 1055-1056 (Mass. 1979).

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'tichGow V(>le--> **Ohio Civil Rights Commission**

220 **Parsons Avenue, Columbus, OH** 432664ti43, (614) 466-2785, FLEX (614) 644-8776

November 13, 1990

Madeline Testa, EEO Supervisor
General Motors Corporation
2369 Ellsworth Bailey Rd., S.W.
P. O. Box 1427

D. The Public Policy Cause Of Action Should Not Be Dismissed

General Motors also claims that Ohio's public policy exception is unavailable here because a separate remedy is available by statute. The argument is' contrary to the Ohio Supreme Court decision in Greely v. Miami Valley Maintenance ontrs.. Inc., 49 Ohio St.3d 228 (1990). The Court held:

> "Public policy warrants an exception to the employmentatwil~ doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute." 49 Ohio St.3d at 228, syl. at 1.

Nothing in Greely limits the application of this exception to cases where no remedy exists in the statute. In plain language, Gr~ applies to any discharge or discipline in violation of a statute. Here, the transfer and other discipline of Turner was racially motiviated, in violation of both state and federal law. Under the plain language of Gre~, that is sufficient to trigger the public policy exception. General Motors' motion for summary judgment of Turner's public policy claims must be denied.

E. The Intentional Tort Claim Should Not be Dismissed.

General Motors also claims that Turner cannot make the requirements for an intentional tort under Ohio law. The requirements for an intentional tort are:

> "(1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty and not just a high risk; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task." Van Fossen v. Babcock & Wilcox Co., 36 Ohio St.3d 100, syl. at 5 (1988).

In arguing that Turner cannot meet this standard, General Motors claims that it is an "undisputed fact" that General Motors moved Plaintiff out of the dangerous area, and has not required him to remain in the windshield install area. This line of reasoning ignores the context in which the transfer occurred and the months of continuous harassment that preceded it. General Motors was aware that Turner was being subjected to a pattern of harassment and took no meaningful steps to end the harassment. Rather than

addressing the problem by locating and punishing the wrongdoers, Turner was transferred. The transfer itself cannot be isolated, and Defendant's argument on this cause of action must fail. Although General Motors does not point to any evidence o dispute the point, it is worth noting that the other elements f an intentional tort are present as well. General Motors

clearly knew of the harassment of Turner, since Turner reported each action to his supervisors. That the work area constituted a

angerous condition and that General Motors knew `that harm was substantially certain to occur is proven with the same evidence that proves an intentional infliction of an emotional distress claim. The evidence showing the nurturing of the hostile work place clearly presents a jury issue as to whether or not a condition existed that General Motors knew posed a danger to Turner's emotional health. As the Contreras court noted, we are well past the point where racism can be considered emotionally harmless. And, as explained above, General Motors ignored the repeated complaints about this conduct and refused to take appropriate steps to remedy the situation despite the emotional danger presented by the hostile environment. This establishes

knowledge of a substantial certainty of harm. The elements of an intentional tort are present here.

CONCLUSION

General Motors' claim for summary judgment on Turner's discrimination claims essentially requires that this Court, like General Motors before it, turn a blind eye to the harassment that was routinely directed at Plaintiff by his co-workers. It also requires that this Court ignore General Motors' quiet complicity in those acts. General Motors' attempt to isolate its actions in transferring Turner from the pattern of racially harassment and abuse by its employees is unavailing. It is the continued harassment, and General Motors' lack of corrective action, that forms the basis for Turner's discrimination and related state law claims.

For the foregoing reasons, and upon the authorities cited, Defendant Company' s request for a summary judgment should be denied.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARK A. TURNER

) 4:91CV0479

Plaintiff) JUDGE DAVID D. DOWD
) (Magistrate Judge Jack B. Streepy)

V.)

GENERAL MOTORS CORP., et al.)
) REPORT AND RECOMMENDED
Defendants) DECISION OF MAGISTRATE JUDGE

STREEPY, MAG. J.

Plaintiff Mark Turner (Turner) has brought this action asserting eleven counts against his employer, General Motors (GM),1 and a coworker, Jeff Ringer (Ringer). Plaintiff's amended complaint alleges four discrimination causes of action, Counts I, II, III and V, pursuant to both Title VII and the Ohio Civil Rights Act. His first cause of action alleges that GM tolerated

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and condoned a racially hostile work environment, and discriminated against him on the basis of race in involuntarily transferring him to another department. His second cause of action alleges that GM tolerated and condoned a religiously hostile work environment, and discriminated against him on the basis of religion in involuntarily transferring him to another department. His third cause of action alleges that GM transferred plaintiff to another department in retaliation for protected activity. His fifth cause of action alleges that GM subjected him |

1. Plaintiff named as defendants General Motorsf'~Corporation and Buick Oldsmobile Cadillac Group of General Motors Corporation, referred to hereafter collectively as GM."

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...Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

The evidence need not be in a form admissible at trial in order to

avoid summary judgment, but Rule 56(e) requires the opposing party

to go beyond the pleadings and by [his] own affidavits, or by the "depositions, answers to interrogatories, and admissions on file,@@ designate Unspecific facts showing that there is a genuine issue for trial.@@ Id. at 324.

The Sixth Circuit in Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989), has interpreted Celotex and two related

cases, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio, 475 U.S.

574 (1986), as establishing a "new era" of favorable regard for

summary judgment motions. Street, at 1479-80, sets forth ten "new

era principles:

1. Complex cases are not necessarily inappropriate for summary judgment.

2. Cases involving state of mind issues are not necessarily inappropriate for summary judgment.

3. The movant must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non-movant's case.

4. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.

5. A court should apply a federal directed verdict standard in ruling on a motion for summary judgment'. The inquiry on a summary judgment motion or a directed verdict motion is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

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6. As on federal directed verdict motions, the "scintilla rule" applies, i.e., the respondent must adduce more than a scintilla of evidence to overcome the motion.

7. The substantive law governing the case will determine what issues of fact are material, and any heightened burden of proof required by the substantive law for an element of the respondents case, such as proof by clear and convincing evidence, must be satisfied by the respondent.

8. The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."

9. The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

10 The trial court has more discretion than in the Scold era" in evaluating the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could not lead a rational trier of fact to finder for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is 'implausible."

I. Background

The facts, construed most favorably to plaintiff, are as

follows. Plaintiff is a black Baptist minister who began working

at GM's Lordstown plant in July 1978. Deposition of Mark Turner

(hereafter Dep.) at 113. Around 1988 he started working in the

windshield install area, dep. at 178, where the windshield is put

in the car as it moves down the assembly line. Dep. at 186.

(plaintiff could not recall the exact wording) Dep. at 233. Plaintiff found the comments "traumatizing." Dep. at 232, 234. He asked Estes to stop, then asked the GM foreman, Greg Brown, to make Estes stop. Dep. at 237. Brown said something to Estes that plaintiff did not hear, and Estes stopped the offensive behavior.4 Dep. at 238. Plaintiff does not recall any homosexual comments or similar conduct subsequently directed at him by Estes or by any other coworker. Dep. at 238-40, 244.

4. Plaintiff contends that Estes was more severely punished for less serious infractions against white coworkers. He was suspended when Brown observed him yelling at and threatening a coworker. Dep. at 887-92. He was also suspended for shoving a coworker in 1991. PX N at 64-65. Both of these incidents occurred after he made the offensive comments to plaintiff. It cannot be stated that they were less serious than the homosexual comments made to plaintiff.

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does not believe he was discriminated against prior to 1990. Dep. at 1167.

A. January 1990 to the Transfer on October 26, 1990

Most, but not all, of plaintiff's hostile work environment evidence relates to the first ten months of 1990, ending on October 26, 1990, when he was transferred out of the windshield install area. Beginning in early 1990, a series of incidents occurred which plaintiff claims were motivated by racial and religious bias.

A coworker, David Estes made some homosexual comments to plaintiff, suggested they go to a motel, and Leered" at him. Dep. at 231-236. Plaintiff states Estes tied his comments to racial bias when Estes also stated that black people have large posteriors

Installation involves setting the windshield, then applying

"lace, which holds the windshield in place. Pla'intiff states he

3. Defendants make numerous references to plaintiff's psychiatric problems. This goes to credibility or damages, but is not relevant to the summary judgment analysis.

Within a month after that incident, plaintiff states that he Nowas assaulted by another coworker, defendant Ringer. Dep. at 247- 0

48, 252-58, 327-28. Plaintiff went to the GM labor relations office and reported the incident. He does not know the extent of their investigation into the matter, dep. at 285, but Ringer was immediately discharged. Ringer filed a grievance over this discipline, and as a result, he was reinstated with the loss of one week's pay. Defendant's Exhibit (DX) P at 37.

On another occasion, a dead snake was placed in plaintiff's work area. Plaintiff did not, at the time, know who placed the snake in

his area, but suspected Estes or Ringer, as they were

both present and Estes said to plaintiff, "look, we got something there for you," and Ringer had a grin on his face. These actions made plaintiff think that the snake was directed at him. Plaintiff pointed the snake out to Brown, who removed it. Brown held the snake up for a moment and asked everyone in the general area who did it, but nobody said anything. Plaintiff never complained of Brown's handling of the incident because he did not feel there was anything Brown could do. Dep. at 334-38, 341-50, 361-64. In the course of this lawsuit plaintiff has learned that the snake was placed in his area by another coworker, Margaret Danko (Danko). Plaintiff believes she may have placed the dead snake in his area because of an argument they had over another coworker's music, during which Danko muttered an obscenity at plaintiff under sher breath but loud enough for plaintiff to hear. Dep. at 352-60. Danko testified that she put the snake

in the area as a prank not ! directed at any specific person. DX V, at 20-21.

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Plaintiff testified that coworker Russ Howard, or "Repairman Russ," called him profane names and made an obscene gesture at him. Plaintiff reported this to Brown, who spoke to Russ. Russ stopped for a time, but then began again. Brown again talked to him and he stopped. Dep. at 404-06.

Two coworker glass fitters, named Ron and John, also called ;plaintiff obscene names. Plaintiff did not report this and does not know if management was aware of it or if anything was done. Dep. at 406-07.

On another occasion, coworker Carl Cononico approached plaintiff, Ingot in his face, and threatened him. Cononico returned to his own work area and threw three balled-up work gloves at plaintiff, then approached plaintiff and threatened him again. Plaintiff reported this to Brown, noting that Cononico appeared to be under the influence of alcohol

or drugs. Brown commented that Cononico was acting strangely and escorted him to medical where he was given a sobriety test. Dep. at 684-96; DX 3 at 21.

Another coworker, Porter, was upset that plaintiff had reported Cononico. Dep. at 413. He called plaintiff obscene names and told him to "think about that" when he was preaching. Plaintiff reported this to Brown, who told Porter to stop. Porter did not stop until the end of the shift. Plaintiff did not have further trouble with Porter after that day. Dep. at 407-08.

Plaintiff also had an altercation with another coworker, Earl Thompson (Thompson). He did not usually work with plaintiff, but one day they were setting glass together. Thompson initially came over and told Turner that nobody liked him in the windsheild install area and turner should get ajob on another line. As they were setting a windsheild, Thompson "blew up" at plaintiff, saying that he almost fell in front of

f an approaching car because of plaintiff.5 Dep. at 790-806. Plaintiff reported this to Brown, ons Representative John Brincko came down. Brown told plaintiff Thompson often used abusive

language and had an attitude problem. Brown and Brincko indi

cated to plaintiff that they would not discipline Thompson for

cursing, since Thompson had not used any racial epithets. Plain

tiff told them he felt that they were discriminating against him

in not disciplining Thompson, as Thompson's acts violated shop

rules. Dep. at 806-28, 840-42. Brown has testified that he did

not discipline Thompson because he felt Thompson spoke out of

anger and fear at almost getting hurt. PX I at 79 (Brown deposi

tion).

Mark Turner.

Plaintiff contends that on two occasions his van was vandalized while it was parked on the GM lot. The lot is open to the

5. When two workers work together setting windshields, one must walk around the front of

the car as it moves down the assembly line while holding one end of the windshield. 8

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public. Dep. at 432. Once, plaintiff found that all of his tires had been slashed and were flat. He does not know who slashed his tires. He reported this to security. Dep. at 373-74, 377-79. On a later occasion, the lug nuts on the rear axle tire on the driver's side were loosened, so that as plaintiff was driving away, the tire came off. Plaintiff does not know who did this. He was driven home by a black supervisor, who expressed the opinion that his van had been sabotaged as a racist incident and said that he too had been threatened by white employees in the past. Dep. at 384-94. Plaintiff asked Security to watch his van, but they refused stating that they ~~@dontt do that.@ Dep. at 381-82, 436-38. Plaintiff does not know what investigation management conducted. Dep. at 382.

On one occasion Brown wanted plaintiff disciplined for tardiness, but his committeemen successfully defended him. Brown said, "I'm tired of this mother fucker,' and referred to plaintiff as a "lucky mother fucker. Dep. at 912. Plaintiff reported this to his committeemen. Brown was reprimanded in such a way that he considered career-threatening. DX L at 69, 89-90. Brown never used profanity at plaintiff again, although he did say that plaintiff reminded him of his little girl. Dep. at 926.

On another occasion coworkers Estes and Cameron repeatedly threw pornography on plaintiff's desk. Plaintiff complained to

6. Plaintiff also testified that this supervisor had earlier talked to him about transferring to another area order to end the problems plaintiff was having with his coworkers, and at that time also related to plaintiff that he had problems with white employees. Dep. at 394-98.

Brown, who expressed an unwillingness to intercede, but said he would look into it. Nonetheless, the activity occurred on other occasions, but plaintiff never again complained about it. Dep. at 626-42

Plaintiff saw posters that were directed at him. When he returned from a short break, he saw a sign that had been posted that said, "Mark sucks.' Plaintiff told Brown to come look at it, and Brown took the sign down. Later that same day, a poster of a black basketball player at the free throw line, on which was written, "Dark Mark, the all American loudmouth was stuck on the hood of a car on the assembly line. Plaintiff pointed it out to Brown, who took it off the car. Plaintiff does not know who was responsible for either poster. Dep. at 975-91. A third poster said "Darky Marky." The coordinator took it down, and threw it in the trash basket, where plaintiff saw it. Dep. at 991-93.

There was also graffiti directed at plaintiff, which appeared in the restroom. On one occasion (after the incidents with the posters but before he was transferred out of the windshield install area)

plaintiff saw, written on a restroom stall door, "Dark Mark sucks.' Plaintiff reported this to Brown. Plaintiff does not know who wrote it, or whether the graffiti remained there for any length of time after he notified Brown, since he subsequently avoided that stall. Dep. at 994-98.

Two incidents occurred between plaintiff and coworker John Kerish. On the first occasion, Kerish accosted plaintiff regarding the operation of a heat lamp. Plaintiff complained to Brown. Brown spoke to Kerish. Plaintiff heard Brown tell Kerish

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to leave plaintiff alone. After that, Kerish only mumbled to himself that he disliked plaintiff. Dep. at 450-60, 463-69.

On the second occasion, on October 26, 1990, Kerish was helping to train a temporary employee in the windshield install area. Kerish said to plaintiff, "That's it, I want

you to teach him, because I want to take a break. Plaintiff responded that he didn't like the way Kerish asked him, and that it was Kerish's job, not his. Kerish became angry, and began calling plaintiff a crybaby and using obscenities and threatening to "kick his ass." Dep. at 470-81. Plaintiff left the line and went to Greg Brownws desk to complain. Brown told plaintiff that he was giving him notice for walking off the line. Brown then proceeded to take sequence numbers from those jobs plaintiff had not done. Brown then took plaintiff up to labor relations. After some discussion there that plaintiff does not remember, he was told to return to the job. Dep. at 481-88. Brown instructed him to train the temporary. Plaintiff again complained.

B. The Transfer on October 26, 1990

Later, on October 26, 1990, Brincko came down and told plaintiff he was being moved to Jim Mass' area. Brincko said that

Mass was of the same color, race and religion as plaintiff, that Mass was also a minister, and there were other Christians in the department. Brincko also told plaintiff he was concerned about plaintiff's health and safety and welfare. He further warned plaintiff that if he returned to the windshield install area, he would be disciplined. Dep. at 488-99, 507-15.

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Four days later, on November 1, 1990, plaintiff filed a charge with the EEOC and the OCRC, charging discrimination in the transfer.

C. Incidents After October 26, 1990

Plaintiff alleges that after the involuntary transfer, he was repeatedly transferred to different departments and subject to increased supervision and criticism from supervisors. Plaintiff testified that some of his supervisors referred to the charges he filed on November 1, 1990. See Dep.

at 1283, 1298-99. He testified that he was often subject to close scrutiny and threats of discipline for unsatisfactory performance on jobs he had just been transferred to and had not learned yet, and that he was given more difficult work. Dep. at 1292-95, 1302.

Plaintiff testified that after he was transferred, he again saw graffiti in the same restroom. One day he saw written in one stall, "Goodbye, Mark Turner.*@ He reported this to his foreman, Mark Gasparek, that day. Gasparek said he had seen it. The next day plaintiff saw written on another stall, in the same bathroom, "We won, Mark Turner." Subsequently plaintiff saw an automobile >carrier (which was on the assembly line) on which was written, l "Mark, the load, Turner."

Plaintiff discussed these incidents, and how to remove the I graffiti, with Gasparek, another foreman named John French, and a union committeeman. They said they could **supply plaintiff** with a rag to remove the graffiti, which upset plaintiff because he

felt that a maintenance person should be responsible for it. Plaintiff states that the graffiti remained in the bathroom

long times

and that the carrier was only partially cleaned so that "the load" and part of his name remained visible. Dep. at 998-1010. II. Federal and State Discrimination Claims A. Racially Hostile Environment (Count I)

Title VII makes it "an unlawful employment practice for an employer...to discriminate against any individual with respect to his...terms, [or] conditions...of employment, because of such

individual's race, color, religion, sex or national origin.@ 42 U.S.C. §2000e-2(a). A plaintiff must satisfy "two requisite elements for a racially hostile work environment claim: Repeated slurs and management's tolerance and condonation of the situation.'" Davis v. Monsanto Chemical

Co., 858 F.2d 345, 349 (6th Cir. 1988), cert. denied, 490 U.S. 1110 (1989), quoting Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985), cert. denied, 475 U.S. 1015 (1986). The analysis enunciated in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) is not readily adaptable to hostile environment claims; rather, the ultimate burden of proof remains with plaintiff followed by a proffer of defense and an opportunity for rebuttal. Rabidue v. Osceola Refining Co., 805 F.2d 611, 621 (6th Cir. 1986), cert. denied 481 U.S. 1041 (1987).

As to the first element, Lathe plaintiff must show that the alleged racial harassment constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to perform the

tasks required by the employer.@@ Davis, 858 F.2d at 349. "[W]hether an environment is

'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Systems, Inc., 114 S.Ct. 367, 371 (1993). Although psychological injury is relevant to whether plaintiff found the environment abusive, it is not a required element of a cause of action. Id.

There is a genuine issue whether the above noted working environment was unreasonably abusive or offensive, or would adversely affect the reasonable employee's ability to perform his job. The more difficult issue is whether there is a

genuine issue whether the hostile working environment was a racially hostile working environment.

Only a few of the incidents plaintiff complains of were overtly racial: (1) plaintiff has a vague recollection that Estes' homosexual overture was couched in racial terms; (2) two different posters said, in part, "Dark Marker and @@Darky Marky;" and (3) one incident of bathroom graffiti said nDark Mark.w~~ Moreover, the later graffiti incidents (after the October 26 transfer) occurred in the same bathroom as the prior overtly racial graffiti, which raises a genuine issue whether an inference of racial bias also motivated the later incidents. Finally, since the first Estes incident was overtly racial, racial bias could arguably be inferred as to the subsequent pornography incidents with Estes.

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While there is no evidence that the other incidents were racially motivated, the above noted racially motivated incidents, especially the anonymous nature of the incidents, are sufficiently severe to create a genuine issue whether plaintiff was working in a racially hostile environment. Davis, 858 F.2d at 348-49.

As to the second element, in order to show that the employer tolerated or condoned the situation, plaintiff must show that the employer knew or should have known of the alleged conduct, and failed to take prompt and remedial action. An employer who has taken reasonable steps to correct and/or prevent the racial harassment has not violated Title VII. Id. at 349. Remedial action by the employee must be reasonably calculated to end the

harassment for the employer to avoid liability. "Title VII imposes on employers an affirmative duty to seek out and eradicate a hostile work environment.@ Hansel v. Public Service Co. of Colorado, 778 F.Supp. 1126, 1133 (D.Colo. 1991). "Plainly, an appropriate corrective response will vary according to the fre quency and severity of the alleged harassment Bell v. Chesapeake & Ohio Ry. Co., 929 F.2d 220, 224 (6th Cir. 1991).

Summary judgment is appropriate if the employer's response does not raise a genuine issue of whether the response was appropriate. See Davis, 858 F.2d at 349-50; Bell, 929 F.2d at 225.

GM failed to take any action on a few occasions. Estes was not disciplined for throwing pornography on plaintiff's desk.

Some of the graffiti was not timely eliminated, and management suggested that plaintiff remove some of it. There is no evidence that GM investigated who was responsible for the anonymous

graffiti or poster incidents. There remains an issue of fact whether GM took reasonable steps to remedy or prevent the racially hostile work environment.

B. Religiously Hostile Environment Claim (count II)

Plaintiff's amended complaint also alleges a cause of action for a hostile work environment based on his religious beliefs.

Such claims are considered under the same standards as other hostile environment cases. See Weiss v. United States, 595

F.Supp. 1050 (E.D. Va. 1984); Man-of-Jerusalem v. Hill, 769 F.Supp. 97 (E.D.N.Y. 1991).

Even interpreting the evidence most favorable to plaintiff, defendants are entitled to summary judgment on this claim. The only incident that was arguably motivated by religious bias was when Porter told plaintiff to @@think about that" when he was preaching. This is insufficient to create an issue whether Turner was subjected to a religiously hostile work environment.

C. Discriminatory Transfer (Counts I and II)

Plaintiff also alleges that his transfer to Jim Mass' area was motivated by racial and religious discrimination.' Defendants argue that plaintiff cannot establish a prima facie case under the

McDonnell-Douglas/Burdine analysis. This analysis is appropriate in cases where a plaintiff relies on indirect or circumstantial evidence to create an inference of discrimination by establishing a prima facie case. Hatcher v. Greater Cleveland Regional Transit

7. The first cause of action alleges that the transfer was motivated by race discrimination; the second that it was motivated by religious discrimination. They will be dealt with together.

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Authority, 746 F.Supp. 679, 684 (N.D. Ohio 1989) (Aldrich, J.), aff'd 911 F.2d 732 (1990). However, "[i]t is well settled that if a plaintiff presents direct evidence of discrimination, she need not proceed under the McDonnel Douglas formula.@* Christopher v. Stouder Memorial Hospital, 936 F.2d 870 (6th

Cir.), cert. denied, 112 S.Ct. 658 (1991). See also Terbovitz v. Fiscal Court of Adair County, 825 F.2d 111, 114-15 (6th Cir. 1987), citing Trans World Airlines, Inc. v. Thurson, 469 U.S. 111, 121 (1985).

Plaintiff states that when Brincko told him he was being transferred to Mass' area, he emphasized that Mass was of the same race and religion as plaintiff.8 Affidavit of Mark Turner, S13; Dep. at 509-15. These comments establish a genuine issue whether there is a Drima facie case that the transfer was discrLminatorily motivated, both as to race and religion.

The burden then shifts to defendants to articulate a legitimate, non-discriminatory reason for transferring plaintiff. See Terbovitz, 825 F.2d at 115; And v. Proctor & Gamble Co., 932 F.2d 540, 549 (6th Cir. 1991). GM states it transferred plaintiff to protect him from harm from coworkers with whom he was having problems.

There is a genuine issue whether defendants' stated reason is pretextual. As noted above, there is an issue whether GM tolerated or condoned the racially hostile work environment.

Thus, in addition to the above noted comment by Brincko, there is other evidence that GM's reason for the transfer was to accommo

date racial biases of coworkers. See DeGrace v. Rumsfeld, 614 F.2d 796, 803-04 (1st Cir. 1980) (A discharge because of absenteeism motivated by racial harassment from plaintiff's fellow workers and his supervisors failure to take reasonable measures to prevent or correct the same, cannot be said to be free from any discrimination based on races even if the ultimate decision maker was moved purely by a legitimate concern.")

With reference to religion motivating the transfer, the aforementioned statement of Brincko, in combination with earlier efforts to induce plaintiff to voluntarily move to a new

department,9 shows there is a genuine issue whether religious bias motivated the transfer.

There is a genuine issue whether GMts transfer of plaintiff was motivated by race and/ or religion. Thus, summary judgment is inappropriate on this claim.

D. Retaliatory Transfer (Count III)

Plaintiff's third cause of action alleges that the aforementioned transfer was also in retaliation for plaintiff's having opposed the racially and religiously hostile work environment. To

establish a prima facie case of retaliatory treatment, plaintiff must establish: (1) that he engaged in protected activity; (2) the employer knew of this activity; (3) that he was the subject of*9.IN a disscussion plaintiff had with a supervisor, plaintiff was advised to transfer to another department. DEP. at 394 -98 On another occasion, plaintiff successfully grieved an involantary transfer to Jim Mass' area.Turner affidavit,10-f.

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adverse employment action; and (4) that there is a causal link between his protected activity and the adverse action of his employer. Hill v. Judson Retirement Community, 775 F.Supp. 1090, 1095 (N.D. Ohio 1991), citing Wrenn v. Gould, 808 F.2d 493, 500 (6th Cir. 1987). Defendants argue they could not have retaliated against plaintiff prior to November 1, 1990, because that is the date plaintiff filed his administrative charges. The complaint alleges that plaintiff received retaliatory treatment because of the frequent complaints, beginning in January of 1990, he made to Brown about the hostile work environment. Most of the incidents were prior to November 1, 1990. Section 704 of Title VII (42 U.S.C. 52000e-3(b)) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful emDloyment Dractice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter....[Emphasis added.]

This statute protects two types of activities. It protects those who 'opposed" employment practices made unlawful by Title VII, even without filing discrimination charges, as well as those who "participated" in an administrative proceeding under Title VII.

Plaintiff alleges Count III under the opposition clause, which does not require the filing of charges. Holden v. Owens Illinois, Inc., 793 F.2d 745~~ 748 (6th Cir. 1986), cert. denied, 479 U.S. 1008 (plaintiff's retaliation claim was under "opposition clauses because she did not allege firing was due to filing discrimination

complaint); Spence v. Local 1250. United Auto Workers of Americas

595 F.Supp. 6 (N.iD. Ohio 1984) (it is irrelevant that plaintiff did not actually file charges under Title VII or testify in a proceeding brought under the Civil Rights Act. "opposition to discriminatory practices can take a wide variety of forms, and is not limited to the filing of charges.); citing Croushorn v. Board of Trustees of University of Tennessee, 518 F.Supp. 9, 21 (M.D. Tenn. 1980).

Since plaintiff submitted evidence that he opposed the acts of discrimination, he has satisfied the first element of engaging in protected activity. The second element (defendants knew of plaintiff's activity) is not in issue since plaintiff reported the objectionable incidents to GM supervisors. Plaintiff has also satisfied the third element, that he was subject to adverse

employment action, because he was involuntarily transferred.

Finally, plaintiff must show a causal link **between** his protected activity and the adverse action. The alleged racial reason given by Brincko for the transfer constitutes some evidence that defendants transferred him in retaliation for objecting to the racially hostile environment. Summary judgment is not appropriate on the third cause of action.

E. Retaliatory Discipline (Fifth Count)

Plaintiff's fifth cause of action alleges that subsequent to the October 26 transfer, defendants subjected plaintiff to unnec- essary and unwarranted disciplinary action in retaliation for his opposition to the hostile work environment, and for filing charges on November 1, 1990 with the Ohio Civil Rights Commission and the Equal Employment Opportunity Commission.

Plaintiff has satisfied the first element, that he engaged in protected activity. He not only filed charges with the Ohio Civil Rights Commission and the Equal Employment Opportunity Commission. Furthermore, he raised his objections prior thereto ;

to management concerning the hostile work environment.

As to the second element, GM does not dispute it was aware

of plaintiff's activity, and plaintiff has testified that various

supervisors mentioned his charges. See Dep. at 1283, 1298-99.

Plaintiff has satisfied the third element, that he was

subject to adverse employment action. He has alleged that he was

subject to increased scrutiny and criticism

after filing charges:

After the involuntary transfer, I filed discrimination

charges against General Motors. General Motors retaliated

against me for filing the charges. I was **transferred** from department to department and required to perform new and different duties. This is unusual at General Motors. I was more closely scrutinized on the job, subjected to continuous supervision, and repeatedly warned that if I made any mis take I would be disciplined. This ongoing and zealous scrutiny never occurred until I filed a discrimination charge. General Motors did not adequately train me for the new job and I received a disciplinary layoff for poor job performance. General Motors supervisor Gasperick, who is white, often referred to the discrimination charges against General Motors in conversations with me. Because of the stress caused by the harassment, I was reporting to medical on occasion. Gasperick ordered me to stop. I was screamed at by Labor Relations Representative John Brincko for inad vertently attempting to park in the wrong parking space. I was told not to use a common walkway near a white employee

who falsely accused me of bothering her. Affidavit of Mark Turner, at S14. Increased scrutiny and criti
cism may constitute adverse employment action S'ee Reves v.

Mathews, 428 F.Supp. 300, 301 (D.D.C. 1976). The causal connection between the adverse employment action
and the protected activity is arguably present Plaintiff

testified he was often subject to close scrutiny and threats of discipline for unsatisfactory performance on jobs he had just been transferred to and had not learned yet, and that he was given more difficult work. Dep. at 1292-95, 1302. He claims Gasparek referred to his discrimination charges while disciplining him, dep. at 1275, 1281-83, and that other supervisors (who either closely scrutinized his work or disciplined him) referred to his charges. See Dep. at 1298-99. There is an issue of fact as to whether the adverse action was motivated by retaliation.

F. Ohio Civil Rights Claims (Counts I, II, III and V)

Plaintiff asserts parallel causes of action under Chapter 4112 of the Ohio Revised Code for each Title VII claim. "Federal case law interpreting Title VII is generally applicable to **cases** involving violations of R.C. Chapter 4112." Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission, 66 Ohio St. 2d 192, 196 (1981). Thus defendants' motion for summary judgment on the Ohio claims of discrimination should be granted or denied consistent with its parallel Title VII claim.

III. Pendent State Tort Claims

A. Public Policy Claims (Counts IV and VI)

Plaintiff's fourth and sixth causes of action allege that the reasons for defendants retaliatory transfer and discipline of plaintiff were prohibited by statute, thus violated the public policies

of the State of Ohio and were unlawful. Plaintiff relies on Greeley v. Miami Valley Maintenance Contractors, Inc., 49 Ohio St. 3d 228 (1990), which held: "Public policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute." Id. at syllabus, S1.

This district has held that "a Greeley cause of action is available only when (1) an employers behavior violates either a statute or a deeply ingrained public policy, and (2) the leaisla- ture has neither provided a private remedy nor expressed an intent to preclude a private remedy." Ungrady v. Burns International Security Services, Inc., 767 F.Supp. 849, 853 (N.D.Ohio, 1991) (emphasis added). Chapter 4112 of the Ohio Revised Code, as well as Title VII, provides a private remedy for discrimination, thus Greeley is inapplicable here. Defendants are

entitled to summary judgment on claims IV and VI.

B. Claim under Ohio Revised Code S4121-80 (count XI)

Plaintiff's eleventh cause of action alleges a claim pursuant to Ohio Revised Code S4121.80. The Supreme Court of Ohio has found that statute unconstitutional in toto as exceeding and conflicting with the legislative authority granted to the General Assembly pursuant to Sections 34 and 35 of Article II of the Ohio Constitution. Brady v. Safety-Kleen CorDoration, 61 Ohio St. 3d 624 (1991) (syllabus, S2). Thus defendants are entitled to summary judgment on this claim.

C. Intentional Infliction of Emotional Distress (Count X)

Plaintiff alleges a cause of action for intentional infliction of emotional distress caused by the aforementioned hostile environment, transfer, and retaliation. Ohio has adopted comment

d to the Restatement (Second) of Torts, §46, relating to intentional infliction of emotional distress claims:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous'

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must **necessarily be expected and** required to be hardened to a

certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. Reamsnyder v. Jaskolski, 10 Ohio St. 3d 150, 153 (1984), citing Yeager v. Local Union 20, Teamsters Chauffeurs, Warehousemen & Helpers of America, 6 Ohio St. 3d 369 (1983). Even an unjustifiable termination of employment is not so extreme and outrageous as to exceed all bounds of decency, thus does not constitute an intentional infliction of emotional distress claim. Hawley v. Dresser Industries, Inc., 737 F.Supp. 445, 469 (S.D. Ohio 1990). The actions and inactions of GM simply did not rise to the level of creating an issue whether there was such extreme and outrageous conduct as "to go beyond all possible bounds of decency See Baab v. AMR Services Corp., 811 F.Supp. 1246, 126970 (N.D. Ohio 1993). Summary judgment is appropriate.

D. Tort action against Ringer (Count VIII)

Plaintiff's eighth cause of action alleges that defendant Ringer is liable to plaintiff for assaulting him. Defendants have not addressed the merits of this claim, asserting only that it should be dismissed under United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Since it is recommended that defendants' motion on the federal claims be denied in part, this

cause of action should not be dismissed on the basis of Gibbs.

E. Respondeat Superior (Count IX)

Plaintiff's ninth cause of action alleges that defendants are liable under respondeat superior for the assault by Ringer. Under Ohio law, an employeets tort must be committed within the scope of employment for respondent superior liability to attach. Where the tort is intentional, the **behavior must facilitate** or promote the business of the employer. Osborne v. Lyles, 63 Ohio St. 3d 326, 329 (1992), citing Byrd v. Faber, 57 Ohio St. 3d 56, 58 (1991). "There is no presumption that the wrongful act of the agent was the act of the principal; authority to do the act must be demonstrated, or ratification of the act by the principal shown. Where the tort consists of a wilful and malicious act, as here, it is not generally considered within the scope of the agent's employment." Findles v. Schuett, 8 Ohio App. 3d 38, 39

(1982), quoted in Hester v. Church's Fried Chicken, 27 Ohio App. 3d 74, 74-75 (19B6).

Ohio courts have granted summary judgment in assault cases finding no respondeat superior liability as a matter of laws even where a supervisor assaulted an employee while disciplining her.

See Hester, supra. Moreover, continuing to employ those who have committed intentional torts is not a ratification of the torts. See Dorsey v. Morris, 82 Ohio App. 3d 176 (1982) (summary judgment appropriate; continuing to employ supervisor who threw object at plaintiff did not ratify supervisorts action, where supervisor was suspended without pay until psychiatric help was sought). As to Ringer's assault, there was no ressondeat superior liability, and GM did not ratify that assault. Summary judgment should be ordered.

F. Respondeat Superior (Count VII)

Plaintiff's seventh cause of action alleges that GM is liable for the unlawful and offensive activities of plaintiff's coworkers (but does not clearly state the predicate state law tort upon which respondeat superior liability is based). It was previously noted that plaintiff states his seventh cause of action is based on his Ohio tort law claims. However, all of plaintiffs tort law claims, but for his claim against Ringer, should be dismissed (see III A to E, supra), thus no predicate exists on which to attach respondeat superior liability.

RECOMMENDATION

It is recommended defendants motion for summary judgment be denied as to the following claims: Count I, which alleges a racially hostile environment and a racially discriminatory transfer; Count II, insofar as it alleges a discriminatory transfer based ox plaintiffs religion; Count III, which alleges a retaliatory

transfer; Count V, which alleges retaliatory discipline; and (as to Ringer) Count VIII, which alleges assault.

I t is recommended defendants motion for summary judgment be

granted as to the following claims: Count II, insofar as it

alleges a religiously hostile work environment; Counts IV and VI,

which allege violations of public policy under Ohio law; Counts

VII and IX, which allege respondeat suDerior under Ohio law; Count

X, which alleges intentional infliction of emotional distress

under Ohio law; and Count XI, which alleges violation of Ohio

Revised Code 54120.80.

Dated 2E}199

Jack B. Streepy
United States **Magistrate Judge**

ANY OBJECTIONS to this Report and Recommendation must be

filed with the Clerk of Courts within ten (10) days of receipt of

_ __ _____. _____ __ age objections within the specified time

WAIVES the right to appeal the District Court's order. See Thomas

v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F.2d

947 (6th Cir. 1981).

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DOWD, J.

Mark A. Turner,

General Motors

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Plaintiff,) CASE NO. 4:91 CV 0479

)

) MEMORANDUM OPINION

Defendants.

! (Disposing of Docket No. 96)

I. INTRODUCTION

Defendant General Motors Corporations has filed a motion for summary judgment (Docket No. 96). This case was referred to a United States Magistrate Judge for a report and recommended

(A-3)

decision ("R&R"). The motion was fully briefed and the

Magistrate Judge issued his R&R on December 27, 1993. Each party

By

Plaintiff uctu lly numed Genercl Hotor~ Corporation, The B O C Group, und Buick Oldsmobil
Cadillac Group ns defendante They are her-^fter r-ferred to collectively ns ZGeneral Sotors
Plaintiff also named an individual defendant, one Jeff Ringer Xr Ringer has not joined in the
instant motion

i Corp., et al.,)
(4:91 CV 0479) filed objections and, subsequently, each party responded to the other's objections. The matter is now ripe for determination .2

The Magistrate Judge recommended that defendant's motion for summary judgment be denied as to Counts I, II (in part), III, V and VIII of the Amended Complaint and granted as to Counts II (in part), IV, VI, VII, IX, X and XI. General Motors objected to those portions of the R&R which denied its motion and plaintiff objected to the

portions which granted the motion. As a result,

this Court is required to conduct a de novo review of the entire motion for summary judgment. Ace Fed. R. Civ. P. 72(b).

II. BACKGROUND FACTS

The underlying facts are set forth in considerable detail in the R&R and need not be repeated here in more than summary form. See R&R, (Docket No. 124) at 4-13.

Plaintiff, an African-American Baptist minister, has been employed by General Motors at its Lordstown plant from July of 1978 to the present. Beginning in July of 1990, plaintiff alleges that his workplace began to be racially and religiously

To •ay that the inou-v are ripe for determination is •w •t inadequate description of the procedural posture of this care, which was reassigned to the docket of the undersigned judge on Octob r 1, 1993 after languishing for over 2• years at the discovery •t-g- ▲revi w of the docket •hov an appalling history of d-lay in the progress of discovery, with numerous w tinny for extension of the discovery deadline filed alw •t •xcluriv-ly by the d fondant Surprisingly, them motions app or to have been routinely and without gumption granted by way of marginal entry ord ru Shin Court is also stunned to •-- that plaintiff alone was deposed for fully •-ven (7) days, resulting in •om 1500 pages of d position t-•tLnonY

This can- iv p rfectly illustrative of the need for the passage of the Civil JusticRJform Act of 1990 and the resulting revision of the Local Rules of the orthern District of Ohio, including the passage of a Differentiated Cane Xanagem nt •ystes designed to reduce cost and avoid Ann Calvary d lay The d lay in this case is all the more unfortunate in light of thin Courts ultimate determination ▲•-t forth in this

Semorandum Opinion In on- month, this ca-will have b en pending for thr (3) full yearn, only to reach a result of Hungary dicsirral It is incompr-henuibl- to thin Court that •o much time could have b n no dad to come to this conclusion

(4:91 CV 0479) hostile. He alleges that numerous co-workers subjected him to all manner of harassment based on his race and religious beliefs. He further alleges that the defendant company condoned all of the behavior and failed to take adequate steps to improve his working conditions. Finally, he alleges that he was transferred to a different job assignment in retaliation for his having complained about the hostile environment. Plaintiff asserts that the transfer is also evidence that the company discriminated against him and condoned his co-workers' behavior.

In his amended complaint, plaintiff asserts ten causes of action against his employer, defendant General Motors: two discrimination claims (racially and religiously hostile work environment, each brought under both federal and state law)

--3 two retaliation claims (brought under both federal and state law) --4 and six pendant state claims (including two claims of violation of public policy, 5 two respondeat superior claims, 6 one claim of intentional infliction of emotional distress, 7 and

one claimed violation of
O.R.C. S 4121.80(G)).8 He a

See Counts I und II

See Counts III and V

See Counts IV and VI

See Counts VII and IX

See Count X

See Count XI

(4:91 CV 0479) asserted one count of assault against a co-worker, Jeff Ringer ("Ringer"). 9

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there are no genuine issues of material

fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. When considering a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion. ..:.:.. Diebold. Inc., 369 U.S. 654, 655 (1962). See, e.c<, U.S. v. Hodges X-Ray. Inc., 759 F.2d 557, 562 (6th Cir. 1985) and cases cited therein. The Court's favorable treatment of facts and inferences, however, does not relieve the nonmoving party of the responsibility 'to go beyond the pleadings" to oppose an otherwise properly supported motion for summary judgment under Rule 56(e). See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Once the moving party satisfies his or her burden to show an absence of evidence to support the nonmoving party's case,

Celotex Corp. v. Catrett, 477 U.S. at 323, the party in opposition "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there isi

See Count VIII

(4:91 CV 0479) a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 47~ U.S. 242, 256 (1986). Although the showing required of the nonmoving party by Rule 56 does not go so far as to require that all opposition evidence be in a form admissible at trial, the rule does require the nonmoving party who has the burden of proof at trial to oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves...." Celotex Corp. v. Catrett, 477 U.S. at 324. General averments or conclusory allegations of an affidavit, however, do not create specific fact disputes for summary judgment purposes.

See Ludan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990). Furthermore, unsworn statements and affidavits composed of hearsay and non-expert opinion evidence, "do not satisfy Rule 56(e) and must be disregarded." See Dole v. Elliott Travel & Tours. Inc., 942 F.2d 962, 968-69 (6th Cir. 1991) (quoting State Mutual Life Assurance Co. v. Deer Creek Park, 612 F.2d 259, 264 (6th Cir. 1979) and citing Adickes v. S.H. Cress & Co., 398 U.S. 144, 158 n.17 (1970)) Nor may a party create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts ... earlier deposition testimony." Reid v.

Sears Roebuck & Co., 790 F.2d 453, 460 (6th Cir. 1986)
(citing

Biechell v. Cedar Point. Inc., 747 F.2d 209 215 (6th
Cir.

1984)).

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On a motion for summary judgment, the Court will consider "[o]nly disputes over facts that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, 477 U.S. at 248. Non-material facts will not be considered. Neither will the judge attempt to weigh the material evidence or determine its truth. Anderson v. Liberty Lobby, 477 U.S. at 249. The judgets sole function will be to determine whether there is a genuine issue for trial such that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. (citations omitted).

Where the nonmoving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof,"

summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. at 323 (equating the standard for a directed verdict under Rule 50(a) with the summary judgment standard of Rule 56). If the evidence is "merely colorable,@@ or is "not significantly probative,@@ the Court may decide the legal issue and grant summary judgment. Anderson v. Liberty Lobby, 477 U.S. at 249-50 (citing Dombrowski v. Eastland, 387 U.S. 82 (1967) (her curiam) and First National Bank of Arizona v. Cities Service Co-, 391 U-S- 253, 290 (1968)). "'The mere existence of a go scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could | reasonably find for the plaintiff.'" Street v J.C. Bradford &

(4:91 CV 0479) Co>, 886 F.2d 1472, 1477 (6th Cir. 1989) (quoting Anderson v. Liberty Lobby, 477 U.S. at 252).

In sum, "tt]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, 477 U.S. at 250.

IV. DISCUSSION

A. Plsintiff's Discrimination and Retaliation Claims (Counts I. II. III and V)

In Counts I and II of the complaint, plaintiff alleged that he was subjected to a racially and religiously hostile work environment. The Magistrate Judge analyzed the facts and concluded, correctly in this Court's view, that there is no evidence to support a claim of a religiously hostile

environment. However, he also found that there is a genuine issue as to whether the work environment was racially hostile. See R&R, at 14-15. Having conducted a thorough de novo review of the record, this Court cannot agree on the latter finding.

Title VII makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his ... terms, [or] conditions ... of employment, because of

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(4s91 CV 0479) such individual's race, color, religion, sex or national origin 42 U.S.C. S 2000e-2(a).1°

To establish a claim of a racially hostile work environment, a plaintiff must show Hrepeated slurs and management's tolerance and condonation of the situation." Erebia v. Chrysler Plastic

Products Corp., 772 F.2d 1250 (6th Cir. 1985), cert denied, 475 U.S. 1015 (1986).1

On the first element, zthe plaintiff must show that the alleged ... harassment constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employees ability to perform the tasks required by the employer." Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 (6th Cir. 1988), cert. denied, 490 U.S. 1110 (1989). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." Harris v. Forklift Systems Inc., _ U.S. , 114 S.Ct. 367, 371 (1993).

SEE COMENT #1

Taking as true the allegations of plaintiff's complaint and viewing all of the evidence in the light most favorable to the plaintiff, all that can be said is that the work environment was arguably very unpleasant, perhaps even hostile from

plaintiff's standpoint. However, there is no evidence to support that it wasp

All of th-a- counts of plaintiffs complaint w r - azz -rt -d under both Title VII and Ohio^ s civil rights statutes, O R C Chapter 4112 The stat - claims or - analyzed under the same •tandarda as the federal claims Plumbers ε Steamfitt-rz Joint AnDrentlcezhln Co ittee v Ohio Civil Richtz Comslaalon, 66 Ohio St 2d 192, 196 (1981); In re Brantley, 34 Ohio App 3d 320, 322 (1987) Therefore, a determination of the f deral claims constitutes a determination of the state alas

See also Kan-of-Jeruzalem v Hill, 769 z Supp 97 (Z D N Y 1991) and Welzn v United States, 595 z Supp 1050 (Z D Va 1984) (claims of religiously hostile environment are considered under the •ame •tandarda an other hostile entlronment clai a)

(4:91 CV 0479) racially hostile. Even the three incidents cited by the Magistrate as "overtly racialz are not sufficient to establish a pervasively hostile environment.

There is nothing, except perhaps the rules of etiquette, to prevent people from being mean to each other on the job. Many people, unfortunately, put up with job environments where they are "picked on" or treated unkindly simply because, for one reason or another, the various employees do

not get along. The fact that some employees are white and others are black does not,

by itself, turn such a situation into a racially hostile workplace. This is true even in the face of plaintiff's affidavit, filed in support of his opposition to the summary judgment motion, wherein he asserts, passim, that all of the incidents which occurred at the job site were motivated by racial animus. There are simply no facts on this voluminous record to support plaintiff's contention. At most, there is a mere scintilla" of evidence, which is insufficient to take this case to trial. Street v. J.C. Bradford & Co., supra.

SEGMENT 27

Furthermore, there is abundant evidence that General Motors responded to each of plaintiff's complaints, investigating as was appropriate and reprimanding and/or disciplining the offenders.

The fact that plaintiff does not agree with the extent of

(4s91 CV 0479) particular investigations or with the ultimate discipline or lack thereof does not create a question for the trier of fact. 12

In Counts I and II, plaintiff also asserted that he was transferred to a different work area because of his race and/or religion. He further asserts, in Counts III and V, that the transfer and disciplinary actions taken against him, were in retaliation for his having complained to his supervisors about the behavior of his co-workers toward him. 13 Because all of these claims address plaintiff's work transfer, they will be considered together.

The Magistrate Judge found that there was some evidence that race and/or religion and the fact that plaintiff had engaged in

protected activity (i.e., had complained to his supervisors) were the bases for plaintiff's transfer to another job in the plant and for subsequent disciplinary actions taken by General Motors against the plaintiff. Thus, the Magistrate Judge concluded that Counts I, II, III and V should survive the summary judgment motion. Again, this Court disagrees.

Under the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs

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A r-a onable person could not and would not •xp-ct General rotors to •xp-nd a lot of time and energy investigating anonymous incidents, •uch as who wrote graffiti on a restroom wall or
who put up arguably offensive posters

42 V S C S 2000--3(a) provides that [i]t shall be an unlawful mploym nt practice for an i employer to discriminate against any of his mploy--a b cause he has mad a charge under this •ubchapt-r It is questionable whether any of the complzln d of b havior can be characterized retaliation •inc- it all occurred prior to plaintiffs having filed any charges with the *OCRC* or the •BOC How var. for purposes of this motion, the Court will not d lv- into this issue, but will pr bus that plaintiff workplace complaints constitute a charge within the meaning of this •oction

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(4s91 CV 0479) v. Burdine, 450 U.S. 248 (1981), plaintiff has the burden of establishing a Drima facie case of discrimination and/or retaliation. If he does

so, defendant must advance a legitimate, nondiscriminatory reason for the adverse employment action in order to rebut the presumption of discrimination raised by the prima facie case. A defendant meets its burden of production by producing "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Burdine, 450 U.S. at 257.

By coming forward with a legitimate nondiscriminatory reason for its actions, a defendant neutralizes the McDonnell Douglas presumption of discrimination. St. Mary's Honor Center v. Hicks, U.S. , 113 S. Ct. 2742, 2747 (1993); United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (the presumption "drops from the case") (citing McDonnell Douglas, 450 U.S. at 255 n.10). However, that does not settle the issue. Plaintiff still has the "'ultimate burden of persuading the trier| of fact that he has been the victim of intentional discrimination.'" St. Mary's Honor Center, 113 S.Ct. at 2747-48 | (quoting Burdine, 450 U.S. at 256). In this manner, the plaintiff may persuade the trier of fact that defendant's nondiscriminatory explanation was no more than mere pretext for unlawful discrimination. See St. Mary's Honor Center, 113 S.Ct. at 2752 (showing merely that an Zemployer's reason is false does

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(4s91 CV 0479) not show that it was offered as a "pretext for discrimination"). Significantly,

discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." St. Marcus Honor Center, 113 S.Ct. at 2752 (emphasis in original).

defendant's transfer of plaintiff in perspective. Plaintiff, and the Magistrate Judge, relied on a remark apparently made by John Brinko, the Labor Relations Representative, that plaintiff was being transferred to Jim Mass's work area because Mass was of the same color, race and religion as plaintiff and because Mass was also a minister. Brinko also told plaintiff that General Motors was concerned about his health and welfare. The Magistrate Judge concluded that these remarks raised a genuine issue

as to whether the transfer WAS impermissibly motivated. This Court finds to the contrary when the circumstances are viewed as a whole.

SEGMENT #4

Plaintiff was admittedly having trouble at his job site. He repeatedly complained about his co-workers; considerable time and effort were expended in response to his complaints. Finally, in AN EFFORT

improve his job conditions, his superiors decided to transfer him. Intent on finding a workplace for plaintiff where he could get along and not be picked on," they chose Mass' work

_ause Mass and plaintiff appeared to have 80 much in common. This is a far cry from being motivated by impermissible, discriminatory

reasons. Defendant had a perfectly permissible,

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SEGMENT #5

"a reason cannot be proved to be 'a pretext for
It is necessary to consider the record as a whol

an effort to 12
(4s91 CV 0479) nondiscr ~~ natory reason for transferring plaintiff: to remove him from his troublesome work site for his own benefit and for the overall benefit of the employer.lz This can hardly be said to be wa pretext for discrimination." Rather, it was a reasonable accommodation to plaintiff in the face of plaintiff s right to and demand for, a solution to his problems with his co

workers.

Furthermore, plaintiff's conclusory assertion that his transfer was in the nature of retaliation, a form of punishmen for his having complained, is without merit because i

absolutely no support in the record. Plaintiff seems to suggest that the other employees should have been transferred and, because they were not, General Motors was condoning their behavior.

From a business perspective, it was perfectly legitimate for General Motors to transfer one employee from a work area where he was having trouble to another work area where the trouble would be eliminated, as opposed to retaining that employee and transferring several others. The former action solved the problem with little disruption to the overall work site, whereas the latter, although probably solving the problem, would have been very disruptive. A reasonable person could not demand such

lt is olvsoualy not in the bent lnter-at of an employer to hav to constantly, and unaucc-aafully, m dints p tty disputes among its employed In order to curry on its business, v11 the employer eon do la try to place p ople in compatible working groups where friction will be minimal and the job will get done

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lt has

(4s91 CV 0479) action on the part of the employer and would not find that the action taken was apretext for discrimination.

As regards plaintiff's claim of retaliatory discipline, once again the record does not support the claim.

Plaintiff's own deposition testimony shows that he was disciplined, both before and after his alleged protected activity, for either violating shop rules or for failing to perform adequately on the tob.15 There is nothing in the record to show that any incident of discipline was based on race or religion or in retaliation for plaintiff's complaints. This is true notwithstanding the contrary conclusory allegations set forth in plaintiff's affidavit, filed after his deposition testimony was given.

In summary, having conducted a thorough de novo review of the record, the Court finds no genuine issue of material fact relating to Counts I, II, III or V. Accordingly, defendant's motion for summary judgment on these four counts is granted.

B. State Claims (Counts IV. VI. VII IX. X and XI)

The Magistrate Judge recommended that summary judgment be entered in favor of

defendant General Motors on all of these claims. The Court has examined the Magistrate Judgefs reasoning

> One •sampl - which plaintiff advances of his having been improperly w rned that he eight ‹dlvoiplin-d w ‹Star he fall-d to install 'on - m ally •-atbelt •acembly •utomobllTurn-r D po , Defend nt'v Exhibit a, at 1292, 1294 It lo curious that pl intlff would conside f allure to install • •eatbelt inruf f intent grounds for ‹disc lplin ry warning Thin example iv illustrative of plaintiff 'v incorrect perception of the workplace nd his employer' v right to demand adequate job performance The fact that plaintiff is black nd his •upervisor iv white do-a not convert thin dlvciplin ry warning into • racial incident

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(Rev. 8/82)

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(4:91 CV 0479) in light of the record and the relevant case law and hereby adopts the same.

Accordingly, for the reasons stated in the R&R, pages 22 through 26, summary judgment is entered for the defendant on all of these counts.

C. Tort Action Aaainst Defendant Ringer (Count VIII)

The Magistrate Judge recommended **that this assault** claim brought against defendant Ringer not be **dismissed since** the federal claims were not dismissed.

However, in light of this Court's instant disposition of the federal claims, there is no ground for jurisdiction over this state law cause of action.

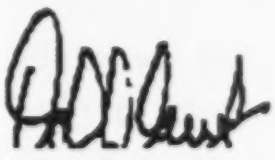
Accordingly, Count VIII is dismissed without prejudice for lack of subject matter jurisdiction.

IV. CONCLUSION

For the reasons set forth above, the motion for summary judgment (Docket No. 96) of defendant General Motors Corporation is granted on Counts I through VII and IX through XI of the complaint. Count VIII is dismissed without prejudice for lack ofi subject matter jurisdiction.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARK A. TURNER
1216 Woodledge
Mineral Ridge, Ohio
44440

PLAINTIFF

GENERAL MOTORS
CORPORATION
c/o its Statutory
Agent
CT Corporation System
815 Superior Avenue
N.E.
Cleveland, Ohio 44114

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- and

GENERAL MOTORS
CORPORATION Buick
Oldsmobile Cadillac
Group 2300 Hallock
Young Road S.W.
Warren, Ohio 44482

CASE NO. 4:91 CV 0479

JUDGE BATTISTI

FIRST AMENDED
COMPLAINT WITH JURY
DEMAND ENDORSED
HEREON

EXHIB.7 hP
D

- and

BUICK OLDSMOBILE
CADILLAC
GROUP
General Motors
Corporation
Lordstown Complex
Warren, Ohio 44482

DEFENDENTS

- and

JEFF RINGER
1400 Cavalcade Drive
Youngstown, Ohio
44515

(A-4)

FIRST CAUSE OF ACTION

1. This is a civil rights action to vindicate rights secured by Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e et seq); and Chapter 4112 of the Ohio Revised Code. Jurisdiction is conferred upon this Court by 42 U.S.C. Sections 2000e-5(f)(3), 28 U.S.C. Sections 1331 and 1343; and its pendent jurisdiction.

2. Plaintiff is a black citizen of the United States, residing in Trumbull County, Ohio. Plaintiff has been employed by Defendants General Motors Corporation; General Motors Corporation, Buick Oldsmobile Cadillac Group; and Buick Oldsmobile Cadillac Group, General Motors Corporation (hereinafter collectively referred to as "Defendant Companies") from 1978 to the present.

3. Defendant Companies are employers within the meaning of 42 U.S.C. Section 2000e(a) and (b), and Ohio Revised Code Section 4112.01(2). Defendant Ringer has, at all times

relevant, been an employee of Defendant Companies.

4. During the course of his employment with Defendant Companies, Plaintiff has been subjected to a barrage of physical / and verbal assaults, threats, intimidation, embarrassment, racist i epithets and vandalism including, among other things, the stashing of his automobile tires, removal of lug nuts from his wheels, tho placing of a dead snake at his worlc station, and exposure to pornographic materials against his will These acts were undertaken by Plaintiff's white co-wor-1cers and/or supervisor because of Plaintiff's race.

5. **Defendant Companies** knew, **or in the exercise of reasonable care should have known, about the previously described campaign of racial harassment. Defendant Companies could have prevented these acts by exercising reasonable care in the** hiring, **supervising, and/or disciplining of the offending employees.**

6. Through Defendant Companies' actions, Defendant Companies interfered with Plaintiff's work performance and created an intimidating, hostile, and offensive work environment.

7. On or about October 26, 1990, after he had complained for many months to Defendant Companies about the incidents described above, Plaintiff was involuntarily transferred by Defendant Companies to a less desirable job. Plaintiff's white .> co-workers and supervisor who had engaged in the previously described unlawful and offensive actions toward Plaintiff were not similarly transferred.

8. Defendant Companies' action in to Plaintiff as described above was based upon his race.

9. Defendant Companies' actions as described above constituted discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02.

10. Defendant Companies' conduct in racially harassing Plaintiff and in transferring Plaintiff because of his race were known to Defendant Companies to be prohibited by Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02, and constituted deliberate, willful, malicious, and intentional violations of said statutes.

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11. **As a consequence of Defendant Companies' discriminatory and unlawful actions, Plaintiff has lost earnings and other benefits he would have enjoyed had he not been transferred from his previous position by Defendant Companies,** and Plaintiff **continues to lose such earnings and other benefits of** employment. **Plaintiff has further suffered and will continue to suffer humiliation, mental and emotional anguish, anxiety, and** physical pain and distress as a result of the racial harassment

and racially discriminatory transfer imposed by Defendant Companies. Plaintiff has also been forced to incur substantial expenses in seeking a remedy for damages directly and proximately caused by Defendant Companies' illegal acts. Defendant Companies' deliberate, willful, malicious, and intentional conduct as alleged herein further entitles Plaintiff to punitive and exemplary damages.

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1-. rldl~~1ellI Illeu cnarges with the Equal Employment Opportunity Commission (EEOC) and the Ohio Civil Rights Commission (OCRC) alleging discrimination in employment on the basis of race under the relevant provisions of Title VII of the Civil Rights Act of 1964 and the Ohio Revised Code. Plaintiff has exhausted the administrative procedures required by law, and has received notice from the EEOC of his right to sue.

SECOND_CAUSE or ACTION

13. Plaintiff hereby restates each and every allegation contained in paragraphs 1 through 12 above as if fully rewritten herein, and further states:

charges with

14. At all times relevant, _ Pastor in the Southern Baptist Church. Plaintiff frequently spoke with his co-workers and supervisor about his deeply held religious views, and, on occasion, read silently from the Bible in the presence of his co-workers and supervisor during breaks from work.

15. During the course of his employment with Defendant Companies, Plaintiff was subjected to a barrage of physical and verbal assaults, threats, intimidation, embarrassment, racist epithets and vandalism including the slashing of his automobile tires, removal of lug nuts from his wheels, the placing of a dead snake at his work station, and exposure to pornographic materials against his will. These

acts were undertaken by Plaintiff's co-workers and/or supervisor because of Plaintiff's religious beliefs.

16. Defendant Companies knew, or in the exercise of reasonable care should have known, about the previously described campaign of religious harassment. Defendant Companies could have prevented these acts by exercising reasonable care in the hiring, supervising, and/or disciplining of the offending employees.

17. Through Defendant Companies' actions, Defendant Companies interfered with Plaintiff's work performance and created an intimidating, hostile, and offensive work environment.

18. On or about October 26, 1990, after he had complained for many months to Defendant Companies about the incidents described above, Plaintiff was involuntarily transferred by Defendant Companies to a less desirable job. Plaintiff's co-workers and supervisor who had engaged in the previously

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described offensive actions toward Plaintiff were not similarly transferred.

19. Defendant Companies' action in transferring Plaintiff as described above was based upon his religion.

20. Defendant Companies' actions as described above constituted discrimination on the basis of religion in violation of Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02.

21. Defendant Companies' conduct in harassing Plaintiff because of his religious beliefs and in transferring Plaintiff because of his religious beliefs was known to Defendant Companies to be prohibited by Title VII of the Civil Rights Act of 1964, and Ohio Revised Code Section 4112.02, and constituted deliberate, willful, malicious, and intentional violations of said statutes.

22. As a consequence of Defendant Companies' discriminatory and unlawful actions, Plaintiff has lost earnings and other benefits he would have enjoyed had he not been transferred from his previous position by Defendant Companies, and Plaintiff continues to lose such earnings and other benefits of employment. Plaintiff has further suffered and will continue to suffer humiliation, mental and emotional anguish, anxiety, and physical pain and distress as a result of the religious harassment and discriminatory TRASNSFER

. imposed by Defendant Companies. Plaintiff has also been forced to illCtIL- sUbstalltial eXpellSeS ill seeking a remedy for damages directly and proximately caused by Defendant Companies' illegal acts Defendant Companies'

deliberate, willful, malicious, and intentional conduct as alleged herein further entitles Plaintiff to punitive and exemplary damages.

23. **Plaintiff filed charges with the** Equal Employment Opportunity Commission (EEOC) and the Ohio Civil Rights Commission (OCRC) **alleging discrimination in employment on the basis of religion under the relevant provisions of Title VII of** the Civil Rights Act of 1964 and the Ohio Revised Code. Plaintiff has exhausted the administrative procedures required by law, and has received notice from the EEOC of his right to sue.

THIRD CAUSE OF ACTION

24. Plaintiff hereby restates each and every allegation contained in paragraphs 1 through 23 above as if fully rewritten herein, and further states:

25. During the many months that Plaintiff was subjected to the actions described in his First and Second Causes of Action, Plaintiff repeatedly complained to Defendant Companies, through its management employees, about the unlawful racial and religious harassment to which he was being subjected.

26. Defendant Companies' involuntary transfer of Plaintiff as described in his First and Second Causes of Action was in retaliation for Plaintiff's having opposed the unlawful discriminatory practices described above. Defendant Companies' retaliatory transfer of Plaintiff violated Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02(I) and

constituted an intentional deliberate, malicious, and willful violation of said statutes.

27. **As a consequence of Defendant Companies'** retaliatory action described herein, Plaintiff has lost earnings and other benefits he would have enjoyed had he not been **involuntarily transferred, and Plaintiff continues to lose such** earnings and other benefits of employment. Plaintiff has further

suffered and will **continue to suffer humiliation, mental and** emotional anguish, and anxiety as a result of the illegal and retaliatory acts of Defendant Companies described herein. Plaintiff has also been forced to incur substantial expenses in seeking a remedy for damages directly and proximately caused by Defendant Companies' illegal acts. Defendant Companies' intentional, deliberate, malicious, and willful retaliatory conduct further entitles Plaintiff to punitive and exemplary damages.

28. Plaintiff filed charges with the Equal Employment Opportunity Commission (EEOC) and the Ohio Civil Rights Commission (OCRC) alleging unlawful retaliation under the relevant provisions of Title VII of the Civil Rights Act of 1964 and the Ohio Revised Code. Plaintiff has exhausted the administrative procedures required by law, and has received notice from the EEOC of his right to sue.

FOURTH CAUSE OF ACTION

29. **Plaintiff hereby restates each and every allegation contained in paragraphs 1 through 28 above as if fully rewritten herein, and further states:**

30. **Defendant Companies' transfer of Plaintiff as described in Plaintiff's First, Second and Third Causes of** Action

was for a **reason prohibited by statute and/or was for a reason of** equally serious import as the violation of a statute. Plaintiff's transfer was, therefore, contrary to the public policies of the State of Ohio and unlawful.

31. Defendant Companies' violation of public policy as

. was intentional, malicious, and in willful disregard of Plaintiff's rights.

32. As a consequence of Defendant Companies' unlawful actions, Plaintiff has lost

earnings and other benefits he would have enjoyed had he not been transferred by Defendant Companies, and Plaintiff will continue to suffer such lost earnings and other benefits of employment. Plaintiff has further suffered humiliation, mental and emotional anguish, and anxiety as a result of Defendant Companies'

s. Defendant Companies' intentional, deliberate, malicious, and willful conduct further entitles Plaintiff to punitive and exemplary damages

FITH CAUSE OF ACTION

stiff hereby restates each and every allegation contained in paragraphs 1 through 32 above as if fully rewritten herein, and further states9

stated herein ' illegal act

33. Plaint

34. During the many months that Plaintiff was subjected to the actions described in his First and Second Causes of Action, Plaintiff repeatedly complained to Defendant Companies, through its management employees, about the unlawful racial and religious harassment to which he was being subjected.

35. On or about November 1, 1990, Plaintiff -- charge with the Ohio Civil Rights Commission and the Equal Employment Opportunity Commission alleging discrimination in employment on the basis of his race and his religion.

36. Defendant Companies have subjected Plaintiff to unnecessary and unwarranted disciplinary action in retaliation for Plaintiff's opposition to Defendant Companies' unlawful and discriminatory employment practices, and for Plaintiff's filing a charge under Title VII of the Civil Rights Act of 1964 and Sections 4112.01 to 4112.07 of the Ohio Revised Code.

37. Defendant Companies' retaliatory actions as alleged herein violated Title VII of the Civil Rights Act of 1964 and O.R.C. Section 4112.02(I), and constituted intentional, deliberate, malicious, and willful violations of said statutes.

38. As a consequence of Defendant Companies' discriminatory and retaliatory actions, Plaintiff has lost earnings and other benefits he would have enjoyed had he not been disciplined by Defendant Companies. Plaintiff has further suffered and will continue to suffer humiliation, mental and emotional anguish, and anxiety. Plaintiff has also been forced to incur substantial expenses in seeking a remedy for damages directly and proximately caused by Defendant Companies' illegal

acts. Defendant Companies' intentional, deliberate, malicious, and willfully retaliatory conduct further entitles Plaintiff to punitive and exemplary damages.

39. Plaintiff filed charges with the Equal Employment Opportunity Commission (EEOC) and the Ohio Civil Rights Commission (OCRC) alleging unlawful retaliation under the relevant provisions of Title VII of the Civil Rights Act of 1964 and the Ohio Revised Code. Plaintiff has exhausted the administrative procedures required by law, and has received notice from the EEOC of his right to sue.

SIXTH CAUSE OF ACTION

40. Plaintiff hereby restates each and every allegation contained in paragraphs 1 through 39 above as if fully rewritten herein, and further states:

41. Defendant Companies' unnecessary and unwarranted discipline of Plaintiff as described in Plaintiff's Fifth Cause of Action was for a reason prohibited by statute and/or was for a reason of equally serious import as the violation of a statute. Plaintiff's discipline was, therefore, contrary to the public policies of the State of Ohio and unlawful.

42. Defendant Companies' violation of public policy as stated herein was intentional, malicious, and in willful disregard of Plaintiff's rights.

43. As a consequence of Defendant Companies' unlawful actions, Plaintiff has lost earnings and other benefits he would have enjoyed had he not been disciplined by Defendant Companies

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Plaintiff has further suffered humiliation, mental and emotional anguish, and anxiety as a result of Defendant Companies' illegal acts. **Defendant Companies' intentional, deliberate, malicious, and willful conduct further entitles Plaintiff to punitive and** exemplary damages.

SEVENTH CAUSE OF ACTION

44. Plaintiff hereby restates each and every allegation contained in paragraphs 1 through 43 above as if fully rewritten herein, and further states: .

45. Plaintiff's injuries as described in this Complaint were directly and proximately caused by Defendant Companies' knowing, willful, wanton, and/or negligent failure to control the activities of Plaintiff's co-workers and supervisor who were engaged in the unlawful and offensive activities described above, or to cease the employment of such co-workers and/or supervisor, when Defendant Companies knew or should have known of those employees' propensities to engage in the unlawful and offensive activities.

EIGHTHS CAUSE OF ACTION

46. Plaintiff hereby restates each and every allegation contained in paragraphs 1 through 45 above as if fully rewritten herein, and further states:

47. Defendant Jeff Ringer is a resident of Mahorlillg County, Ohio.

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48. **On or about February 22, 1990, at Defendant Companies' Lordstown**

facility, Defendant Ringer maliciously assaulted Plaintiff by striking him in the face.

49. As a result of Defendant Ringer's assault on Plaintiff, Plaintiff suffered serious temporary and permanent bodily injuries including, but not limited to, injuries to the face and eye, suffered pain, mental and emotional anguish, anxiety, and humiliation, incurred medical expenses, and other damages.

NINTH CAUSE OF ACTION

50. Plaintiff hereby restates each and every allegation contained in paragraphs 1 through 49 above as if fully rewritten herein, and further states:

51. At all relevant times, Defendant Ringer was an employee and was acting in the course and scope of his employment and/or agency with Defendant Companies and/or Defendant Ringer's actions alleged herein were ratified by Defendant Companies.

TENTH CAUSE OF ACTION

52. Plaintiff hereby restates each and every allegation contained in paragraphs 1 through 51 above as if fully rewritten herein, and further states:

53. Plaintiff alleges that the above described intentional conduct of Defendant Companies was designed and intended to inflict severe emotional distress on Plaintiff and/or

Defendant Companies should have known that its conduct would cause Plaintiff severe emotional distress.

54. **As a direct and proximate result of the intentional** conduct of Defendant Companies described supra, Plaintiff, Mark A. Turner, has suffered severe **emotional anxiety and strain for which he has received and will continue to receive counseling and** treatment.

ELEVENTH CAUSE OF ACTION

55. Plaintiff hereby restates each and every allegation contained in paragraphs 1

through 54 above as if fully rewritten herein, and further states:

56. Plaintiff, Mark A. Turner, is an employee within the meaning of Sections 4123.01 and 4120.80(G) of the Ohio Revised Code.

57. Defendant Companies are employers within the meaning of Sections 4123.01 and 4120.80(G) of the Ohio Revised Code.

58. The injuries described supra were directly and proximately caused by an act and/or acts of Defendant Companies committed with intent to injure another, or committed with the belief that injury was substantially certain to occur. Defendant Companies committed an intentional act and/or acts within the meaning of Section 4121.80(G) of the Ohio Revised Code which proximately caused Plaintiff's injuries and damages.

59. Defendant Companies are liable to Plaintiff for

offs injuries described, sUPra,
pursuant to Section 4121.80 of the Ohio Revised Code.

WHEREFORE, Plaintiff demands:

1. That the Court declare that Defendant Companies' creation of an intimidating, hostile, and offensive work environment as described in Plaintiff's First Cause of **Action constituted discrimination on the basis of race in violation of** Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02;

2. **That the Court** declare that Defendant Companies' creation of an **intimidating,** hostile, and offensive work

laintiff's Second Cause of Action constituted discrimination on the basis of religion in violation of Title VII of Section 4112.02;

1964 and Ohio Revised Code

That the Court declare that Defendant Companies' transfer of Plaintiff as described in Plaintiff's First Cause of Action

constituted discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02;

4. That the Court declare that Defendant Companies' transfer of Plaintiff as described in Plaintiff's Second Cause of Action constituted discrimination on the basis of religion in violation of Title VII of the Civil Rights Act of 19G4 and Ohio Revised Code Section 4112 02;

environment as described in Pl:
the Civil Rights Act of

5. That the Court declare that Defendant Companies' transfer of Plaintiff as described in Plaintiff's Third Cause of Action constituted illegal retaliation in violation of Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02(I);

6. That the Court declare that Defendant Companies' transfer of Plaintiff as alleged in Plaintiff's

Fourth Cause of Action violated the public policies of the State of Ohio and was, therefore, unlawful;

7. That the Court declare that Defendant Companies' subjecting of Plaintiff to unnecessary and unwarranted discipline as alleged in Plaintiff's Fifth Cause of Action constituted illegal retaliation in violation of Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Section 4112.02(I);

8. That the Court declare that Defendant Companies' subjecting of Plaintiff to unnecessary and unwarranted discipline as alleged in Plaintiff's Sixth Cause of Action violated the public policies of the State of Ohio and was, therefore, unlawful.

9. That the Court issue a permanent injunction ordering Defendant Companies to reinstate Plaintiff to his former position and to purge its records, including, without limitation, Plaintiff's personnel records, of tile unnecessary, unwarranted and retaliatory discipline imposed on Plaintiff;

10. That the Court issue a permanent injunction ordering Defendant Companies to refrain from discriminating against or harassing Plaintiff and other individuals on the basis of race and/ or religion.

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11. **That the** Court issue a permanent injunction ordering Defendant Companies and their employees to refrain from **discriminating or retaliating against Plaintiff and** other individuals **on the basis** of their opposing unlawful and discriminatory practices in the work place and/or on the basis of their filing of discrimination charges;

12. That the Court award Plaintiff such actual, compensatory, and punitive damages as he may be entitled by law as a result of the wrongful conduct of any or all of the Defendants as alleged above;

13. That this Court declare, pursuant to Section 4121.80(D) of the Ohio Revised Code that Defendant Companies are liable for damages to Plaintiff on the basis that Defendant Companies committed an intentional tort; and

14. That the Court award Plaintiff his reasonable attorney fees, assess costs against the Defendants, and grant such other and further relief as the Court deems appropriate.

GREEN, HAINES, SGAMBATI, MURPHY & MACALA CO , L.P.A.

«(W0014395)
RICHARD A. ARRAMS
("0014382)
Attorneys for Plaintiff
4th Floor Dollar Bank Building
P O. Box 849
Youngstown, Ohio 44501-0849
Telephone: (216) 743-5101

JURY TRIAL DEMANDED.

GM worker charges discrimination in suit

By LISA A. ABRAHAM
Tribune Chronicle

WARREN — A GM Lordstown employee is suing the car manufacturer, claiming he has been subjected to racial and religious discrimination on the job and was transferred to a less desirable job in the company because he complained.

The lawsuit was filed this week in Trumbull County Common Pleas Court by Mark A. Turner, 1216 Woodledge, Mineral Ridge.

Turner is seeking unspecified money damages from General Motors Corp. and the BOC Group Inc.'s corporate divisions, GM and the Buick Oldsmobile Cadillac Group in Lordstown. Also named in the suit is GM Lordstown employee Jeff Ringer, 1400 Cavalcade Drive, Youngstown.

Turner, who is black and a minister in the Southern Baptist Church, has been employed at GM Lordstown since 1978.

The lawsuit states that during the course of his employment, Turner has been subjected to "a barrage of physical and verbal assaults, threats, intimidation, embarrassment, racist epithets and vandalism."

The vandalism has included the slashing of Turner's car tires, the removal of lug nuts from his wheels, the placing of a dead snake at his work station and exposure to pornographic materials against his will, the lawsuit states.

Turner has frequently spoken with his co-workers and supervisor about his religious views, according to the suit, and on occasion has read silently from his Bible during work breaks in the presence of his supervisor and co-workers.

The suit maintains that GM knew or should have known about the religious and racial harassment. GM also failed to discipline the employees, it claims.

QUALITY AT A PRICE!
JULIE'S
FASHION OUTLET
OPENING SOON

RACE/*Employee sues*

CONTINUED FROM PAGE B1

religion and race.

Mr. Turner's attorney, Ira Mirkin of Youngstown, filed suit this week in Trumbull County Common Pleas Court.

What's alleged: Atty. Mirkin said in an interview Saturday that Mr. Turner was punched in the face by employee Jeff Ringer of Cavalcade Drive, Youngstown, at the start of a harassment campaign by Ringer and other workers.

Ringer, who is white, is the only employee named as a defendant in the suit, which seeks unspecified money damages from General Motors and companies that run its car plants in Lordstown.

Ringer declined comment except to say he could not believe he was the only individual named in the complaint.

Mr. Turner said he is the pastor of Liberty Evangelical, a Southern Baptist Church in Sharon. He would not discuss details of the suit, referring questions to Atty. Mirkin.

The lawyer said some of the allegations in the complaint are:

- Someone put a dead snake at Mr. Turner's work station.
- Mr. Turner was moved to a less desirable job when he complained about the harassment.
- He was exposed to pornographic materials against his will.
- Mr. Turner has been subjected to racial slurs.

The attacks, for the most part, were anonymous, Atty. Mirkin said.

PHONE (216) 538042
MARK TURNER

RACE RELATIONS

Worker sues, charging harassment

- A black General Motors Lordstown employee charges he's been subjected to harassment and abuse at work by white employees who placed a dead snake at his work station.

By DAVID ISEMAN
VINDICATOR TRUMBULL STAFF

WARREN — The Rev. Mark A. Turner, a pastor and General Motors car plant employee, is suing his employer and a co-worker, saying the company did not stop employees from harassing him about

Please see RACE *page* B2

MARK A. TURNER,

Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION, t. ax.

Defendant-Appellee.

FILED

No. 94-3215

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT ,,~,,

JUN - 9 1995

LEURAKU GKEEN, Clerk

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On Appeal from the
United States District
Court for the Northern
District of Ohio

NOT RKOMh0ENDED FOR FULL TEXT PUBLICATION

Siadh Circuit R"h 24 Units citation to specifie situations. Phrase se Rug 24 before citing in • proceeding in a coirt in the Sıxth Circsil. If cited, ^ copy must be served on other pdrhes and the Cowt. This notice is to be prominently displayed if this decisıon ts reproduced.

BEFORE: KENNEDY and SUHRHEINRICH, Circuit Judges; and CHURCHILL, District Judge.

PER CURIAM. Plaintiff, Mark A. Turner, appeals the District Court's grant of summary judgment in this employment discrimination action. Plaintiff contends that defendant, General Motors Corporation, violated Title VII of the Civil Rights Act of 1964 by maintaining a religiously and racially hostile workplace, inappropriately transferring plaintiff, and retaliating against plaintiff for filing discrimination charges. Plaintiff also brings ^8-';_ ..w.w _lai~.lls foL dtsWila.ge ill v olaiion of public policy intentional infliction of emotional distress,

A.5

vicarious liability, and intentional tort. After reviewing the briefs and the record in this case, we believe that the District Court's opinion adequately addresses all of the issues plaintiff raises on appeal. Accordingly, we AFFIRM the District Court's grant of summary judgment based on the reasoning in the District Court's opinion.

The Honorable James P. Churchill, United States Senior District Judge for the Eastern District of Michigan, sitting by designation.

(2)

Supreme Court, U.S.
FILED
SEP 28 1995
CLERK

SUPREME COURT OF THE UNITED STATES

MARK A. TURNER
Petitioner,
vs.
GENERAL MOTORS CORPORAT ION

THE B.O.C GROUP

BUICK OLDSMOBILE CADILLAC GROUP

JEFF RINGER

Respondent

Case No. 95-431

Petition for Writ of Certiorari to the Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI

MARK A. TURNER
15556 STOLTZ ROAD
DIAMOND, OHIO 44412216/538-0424 **Counsel of Record**

SUPPLEMENTAL BRIEF, A DISTINCTION OF RACE AND RELIGION WERE THE BASIS AND MOTIVATION FOR THE DISCRIMINATORY TRANSFER

[redacted]

28 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Did General Motors and Judge David D. Dowd wrongfully concluded in their memoroandums and briefs, both the fact and issue that General Motors cited race and religion as the motivation for the involuntary transfer was not discriminatory towards the Plaintiff Mark Turner? .

A. Does the fact that Generaal Motors cited both race and religion before they transferred Mark Turner raise a genuine issue of material facts?

B. In comparasion to the Plaintiff's opposition to summary judgement brief memorandum with Magistrate Streepy's report and recommendation, did the magistrate wrongfully conclude that Jeff Ringer was discharged, when General Motors Counsel and the Plaintiff's Counsel concluded in thier briefs through depositions, that he was only disciplined for 1 week and then reimbursed with a clear record?

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STATEMENT OF CASE, REASON FOR GRANTING WRIT, SUMMARY ARGUMENT, ARGUMENT, OPINIONS BELOW, CONCLUSION, ARE ALL CONTAINED IN THE TWO ARGUMENTS (1) A DISTICTION OF RACE AND RELIGION WERE THE BASES AND MOTIVATION FOR THE DISCRIMNATORY TRANSFER (2) REMEMBERING ROSA.

APPENDIX ..... (A-1) (A-2) (A-3)

PARTIES TO THE PROCEEDINGS

The Petitioner, Mark A. Turner
15556 Stoltz Road
Diamond, Ohio 44412

The Respondent, (1) General Motors Corporation (2) B.O.C. Group, (3) Buick Oldsmobile Cadiallac (4) Jeff Ringer

JURISDICTION

On 6/9/95 THE U.S. COURT OF APPEALS FOR THE 6 CIRCUIT denied the appeal 94 3215, this court has jurisdiction to review the decsion by writ of certiorari under 28 U.S.C.A.

APPLICABLE STATUTORY PROVISIONS

I. This is a civil rights action to vindicate rights secured by Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e seq) ; and chapter 4112 of the Ohio Revised Code. Jurisdiction is conferred upon this court by 42 U.S.C. Sections 2000e-(f)(3), 28 U.S.C. Sections 1331 and 1343, and its pendent jurisdiction.

INDEX TO APPENDIX

A. 1. Partial excerpt from Judge Davis D. Dowds memorandum and opinion US District Court Norther District of Ohio (Akron) filed 2/10/94 proceedings no. 131 civil docket 91-CV479

A. 2. Partial excerpt from the deposition of Mr. Kenneth Click, David R. Burton & Associates, certified stenotype reporters 614 Stambaugh Bldg., Youngstown, Ohio 44503

A.3 Memorandum in suupport of plaintiffs objection to report and recommended decision of Magistrate Judge filed on1/1/94 in the U.S District of Ohio eastern division,Akron Ohio case no. 4:91CV479 Judge D.Dowd,Magistrate Streepy

A DISTINCTION OF RACE AND RELIGION WERE THE BASES AND MOTIVATION FOR THE DISCRIMINATORY TRANSFER

The Honorable Supreme Court Justice Clarence Thomas, said: "There is nothing affirmative about affirmative action programs", because they show racial preference to one group or segment of people in society and actually treat African Americans with inferiority. When General Motors Supervisory Counsel made a decision to transfer the Plaintiff Mark A. Turner from his regular working job in the windshield area, they cited both race and religion as the basis, criteria and motivation for the involuntary and discriminatory transfer. Extensive discovery, depositions, affidavits and a Ohio Civil Rights investigation, have all conclusively confirmed that labor representative John Brinko stated that " he was transferring Mark Turner to supervisor Jim Mass's line because he would get along better there because they were both Baptist ministers and the same color or black race". Jim Mass is an ordained Baptist minister of some 20 years and is African American discovery has concluded that General Motor's Supervisory Counsel and Labor Relations deliberately transferred Turner to Mass's area on 2 separate occasions making the racial and religious motivation for the transfer conclusive. General Motors also recruited a Baptist minister and deacon with a degree in religious studies who is

likewise a supervisor employed by General Motors by the name of William Fuller to encourage Turner to transfer to Jim Mass's area, this is a further indication to support the claim that race and religion was the contributing factor and motivation for the discriminatory transfer. If the Defendant company General Motors would have said they were just transferring Turner they possibly could have raised an objection to their motivation for the transfer, but they added a definite clause or article in the statement that preempted the transfer, labor rep. John Brinko cited both race and religion and then selected a supervisor that shared the identical ethnic background, African American and religion and vocation, a Baptist by denomination and ministerial vocation, making the Plaintiff's argument conclusive and proving a discriminatory animus ,General Motors displayed racial preference to one group or race of people and regarded African Americans with inferiority, simply because race was the determining factor in the decision to transfer Turner exclusively to Jim Mass. It would be difficult for a Judge or a jury to ignore the specific job placement and assignment to a supervisor of the Plaintiff's identical race and religion. Even if the Defendant Company could argue, as Judge Dowd confirmed that the move was for practical business reasons to alleviate a troublesome work area, the discriminatory actions would be definitely characterized by the selection to transfer Turner to a supervisor of his identical, same race and religion, thus

the Defendant Company cited race and religion as the motivation, substantiating the Plaintiff's contentions that the transfer was discriminatory. Finally Justice D. Dowd said in his memorandum and opinion, "that the company sought out Mass because Mass and the Plaintiff appeared to have so much in common his same color, race and religion", he is absolutely correct that was the company's motivation and actions, that's why the involuntary transfer must be conclusively regarded as racist and discriminatory, for race should not be an attributing factor or criteria for promotions and granting contracts as in affirmative action programs or a demotion and discriminatory transfer that adversely and racially effected the Plaintiff. Both General Motors and Justice David D. Dowd completely ignored in their memorandums and briefs that the Plaintiff Mark Turner was transferred not by the content of his character but by the color of his skin this was a cruel, unfair, mean spirited and apathetic way to judge and remedy a racially oppressive situation for a destitute minority and accommodate the bigotry racial biases and inequities of a predominately racial group. Distinctions founded upon race was abolished and color has been washed out of our American Constitution but both General Motors and Judge D. Dowd made these distinctions. In an attempt to justify and rationalize General Motors discriminatory conduct General Motors stated that they were transferring Turner for his health and welfare to

Jim Mass's line without taking any legitimate steps to eliminate the racially hostile atmosphere and Justice Dowd concluded in his memorandum that it was remedial ,The statement in itself is a predicate of discriminatory actions, why did General Motors supervision tolerate an uncontrolled work site, why were they so permissive about racial and religious harassment ,that the Plaintiff Mark Turner consequently was transferred. This inadequate remedy was not a legitimate non-discriminatory reason for the transfer it ratifyed and encouraged the illegitimate discriminatory behavior, General Motors and Judge Dowd radically concluded that eliminating Turner from the troublesome work area was reasonable from a business perspective but General Motors and Judge Dowd should have concluded that eliminating racism and discriminatory conduct from the troublesome work area was the only reasonable solution or remedy from a business perspective. Both General Motors and Judge D. Dowd have consequently turned Dr. Martin Luther King's dream for equality into a racist nightmare. The entire process of these entire litigation's, pre-trial and summary judgement have been a farcical because General Motors and Judge Dowd have completely ignored that the involuntary discriminatory transfer was based on the distinction of race which was abolished by the Civil Rights Acts which washed color out of the constitution. Therefore I ask the Supreme Court which has jurisdiction over the lower courts

to take remedial action to alleviate this racially oppressive situation.

By either:

1. **By hearing this case**
2. **By settling this case through arbitration**
3. **Remanding it to an expedited trial date**
4. **Or any other remedial solution the court deems**

5.oral argument

(Adarand construction vs. Pena,93-1841 supreme court decision)

REMBERING ROSA

Remembering Rosa Thirty five years ago there was a young black woman who after a long hard day of work was forced to give her bus seat to a white person and migrate to the back of the bus, an area designated for blacks, she refused and was imprisoned for it because she acknowledged the double standards and stood for her civil rights. I earnestly feel my personal situation is comparable to the racial dilemma that confronted Rosa Parks. (1) Rosa was forced to forfeit her bus seat to accommodate the racial bigotry that was pervasive in her day. She was treated with contempt, as a second class citizen, merely because of the pigmentation of her skin, likewise I was asked to forfeit my job in the glass area even though I had preference to it. My labor rep. told me I was being placed with someone of my same race and religion, just as blacks had to be grouped together in the back of the bus with the Montgomery Transit System. What are black people? a group of animals? Homosapeins? Who need to be

grouped together, categorized together according to their species, this was an insult not only to the black race but to the human race and made the constitution of the United States a complete mockery. Management made a physical distinction between race and class I was placed on the back of the bus, they treated whites with supremacy and blacks with degradation as second class citizens. God has created all men equal irregardless of race , national origin, or religious affiliation and it should make no difference who you sit or work next to. This was a civil injustice, a form of segregation which is illegal in this country (Brown vs. The Board of Education 1958.) Rosa was tantalized and subject to a cruel form of mental imprisonment and degradation, where she could visually and mentally observe whites in the bus seat that she deservedly had the rights to occupy. Physically she was forced against her will to move to the back of the bus, her freedom of choice was revoked and her rights infringed upon.

She suffered mental anguish, psychological hardship when from the back of the bus where she was situated she could visually perceive the bigotrous groups of whites who racially harassed her and despised the color of her skin, casually sitting in her bus seat I similarly experienced the same contempt she felt, when I see a white person with less seniority working the job that I rightfully deserve. It is false imprisonment when you see your oppressor having

liberality's, privileges and your company suppressing depriving the racial minority of his right to accommodate the racial bigotry and bias of the Plaintiff's co-workers. The moral dilemma in comparison with the bus seat and my job in the windshield area is not so much the tangible object of the bus seat or the windshield itself but my human and civil rights that they represent. My company has infringed upon, deprived me of my civil right and I want my bus seat, or my job in the windshield are BACK!

Racism is a cancerous malady that infects the spiritual body of America the only alternative we have to restore our health is surgery, no one wants to endure the painful trauma of surgery but it is necessary to restore our health, then after surgery there must be a healing process and the only suave to heal the surgical wounds is that when we realize, individually and collectively as free and democratic Americans, that the only race is the human race and then the healing process can begin.**(HARRIS V. FORKLIFT SYSTEMS,INC.114 S.CT. 367,371 (1993)**

Corporate and Judicial Tyranny

Frederick Douglas once said "The limits of tyrants are prescribed by the endurance of those whom they oppress, find out just what any people will quietly submit to and you have found out the exact measure of injustice which will be imposed upon them".

Argument at Law

General Motors transferred the Plaintiff Mark A. Turner with a distinction founded upon race and religion which is unconstitutional, they cited both race and religion for the motivation involving the transfer Judge Dowd ultimately had complicity with this immoral, unethical decision that infringed upon Turner's constitutional rights because race was the criteria General Motors cited and Justice D. Dowd had complicity with in his opinion and memorandum to initiate this racially motivated transfer. (See partial statement from Dowd's memorandum in the index).

(4s91 CV 0479) not show that it was offered as ."pretext for discrimination"). Significantly,

DOWD, J.

Mark A. Turner,

General Motors

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Plaintiff,) CASE NO. 4:91 CV 0479

)

) MEMORANDUM OPINION

Defendants.

! (Disposing of Docket No. 96)

I. INTRODUCTION

Defendant General Motors Corporations has filed a motion for summary judgment (Docket No. 96). This case was referred to a United States Magistrate Judge for a report and recommended

(A-1)

discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." St. Marcus Honor Center, 113 S.Ct. at 2752 (emphasis in original).

defendant's transfer of plaintiff in perspective. Plaintiff, and the Magistrate Judge, relied on a remark apparently made by John Brinko, the Labor Relations Representative, that plaintiff was being transferred to Jim Mass's work area because Mass was of the same color, race and religion as plaintiff and because Mass was also a minister. Brinko also told plaintiff that General Motors was concerned about his health and welfare. The Magistrate Judge concluded that these remarks raised a genuine issue

as to whether the transfer WAS impermissibly motivated. This Court finds to the contrary when the circumstances are viewed as a whole.

SEGMENT #4

Plaintiff was admittedly having trouble at his job site. He repeatedly complained about his co-workers; considerable time and effort were expended in response to his complaints. Finally, in AN EFFORT

improve his job conditions, his superiors decided to transfer him. Intent on finding a workplace for plaintiff where he could get along and not be picked on," they chose Mass' work

BECause Mass and plaintiff appeared to have SO much in common. This is a far cry from being motivated by impermissible, discriminatory

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:91 CV 419

MARK A. TURNER,	)	
	)	
Plaintiff	)	DEPOSITION
	)	
VS	)	OF
	)	
GENERAL MOTORS CORP., ET AL.,	)	MR. KENNETH CLICK
Defendants	)	

DEPOSITION taken before me, Joni Bryan, a Notary Public within and for the State of Ohio, on the 27th day of August A.D. 1992, pursuant to agreement, and at the time and place therein specified, to be read in evidence on behalf of the Plaintiffs in the aforesaid cause of action, pending in the United States District Court within and for the Eastern District of Ohio.

APPEARANCES

MR. IRA MIRKIN,
On Behalf of Plaintiff

MR. ROBERT S. WALKER,
On Behalf of Defendants

(A-2)

A No.

Q What terms have you used in the General Motors Plant when referring to black employees?

MR. WALKER: I object to that. It assumes that h has used any terms referring to black employees which is not established on the record.

MR. MIRKIN: Will you let him answer?

MR. WALKER: Oh, sure. Go ahead.

A I have good friends that are down there, and they're exceptional; and I would say something on the basis of, "Bring your black ass over here," and that's about it.

Q That's about it?

A Yeah.

Q Outside of work, what terms do you use when referring to blacks?

A - None. I have black neighbors. I don't believe i that.

MR. WALKER: That's all you have to say.

Q What problems did you -- getting back to one of m original questions -- what problems did you observe involvin Mark Turner in the windshield install area?

MR. WALKER: I'm going to object to breadth of that; but you can answer.

A Mark, when I was there, as a repairman, I seen

Mark as a guy that was not very quality-conscious on his job. If he fixed it, fine; and if he didn't, that's fine. And when I worked with him on the line, you know, and got first-hand, I felt that Mark was lazy, and he didn't care about the fellows, people that he worked with.

He did the job the way he wanted it done; and with the job that he was on, he couldn't do that because he worked with two other people.

Q Did you observe any --

MR. WALKER: Are you finished with your answer as to all problems that occurred?

It's fine if he has, and you want to follow up --

MR. MIRKIN: I assumed -- he stopped talking and looked at me -- I assumed he was done.

MR. WALKER: Sure.

Q Did you observe any friction between Mark and any of his co-workers?

A From the time I walked over there after the repair, okay, I noticed a friction that was there because of his religious aspect versus the other people, and their lifestyles.

Q What do you mean by that?

A Well, Turner was religious, and to a lot of people out there that are not, that's like a turn-off.

Q How did you know he was religious?

A Oh, he told you.

Q And how do you know that was a turn-off to the other people, to some of the other people in that department?

A Well, they kind of made faces.

Q Did they tell you that? In conversations with anyone, did they tell you that they found that to be a turn-off?

A No.

Q This is something you could observe?

A I just were so picked up when they made a face.

Q How did they -- let me rephrase that. Did they pick on Mark at all because of that?

MR. WALKER. Object to the form.

A No.

Q Now, Mark told you he was religious?

A Yes, sir.

Q Tell me about that conversation.

A Well, we just talked about families and his family and he told me they went to Sunday School, and by that it kind of led up to the aspect of him telling me that he was a minister. That was about it.

Q Did you have this conversation with him soon after you came into the department?

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARK A. TURNER CASE NO. 4:91CV479

Plaintiff JUDGE DAVID D. DOWD

(Magistrate Judge Jack B. Streepy)

vs -

GENERAL MOTORS CORP., et al

Defendant

MEMORANDUM~~IN SUPPORT OF PLAINTIFFS OBJECTIONS TO REPORT AND RECOMMENDED DECISION OF MAGISTRATE JUDGE

The Report and Recommended Decision of Magistrate Judge(Report) sets out the background of this dispute.Briefly,Plaintiff Mark Turner commenced this action againstDefendantGeneral Motors Corporatio~, Turner's employer. Turner's Complaint asserts eleven (11) causes of action including discrimination claims under federal and state law and pendent state tort claims.

Defendant General Motors moved for a summary judgment.The motion was submitted to Magistrate Judge Streepy. On December 22, 1993, the Magistrate issued a Report and Recommended Decision.

(A-3)

With one excepti on, the Magistrate recommended that the motion be denied with respect to the federal and state discrimination claims. Again with one exception, Magistrate Streepy recommended that the motion be granted with respect to the pendent state claims. Defendants' summary judgment motion should be denied in its entirety. Accordingly, Plaintiff Turner objects to the recommendation that the summary judgment motion be granted with respect to the second, fourth, sixth, seventh, ninth, tenth and eleventh causes of action set out in the complaint.

At the outset, the parties submitted exhaustive briefs to Magistrate Streepy. T!ie reasons why a summary judgment is not appropriate were explained in detail in Plaintiff Mark A. Turner's Memorandum in Opposition to Defendant General Motors Corporation's Memorandum for Summary Judgment.In addition to the arguments set out in the Memorandum,the Magistrate's Report merits these additional observations.

I. **THE COURT SHOULD NOT ADOPT THE MAGISTRATE1S RECOMMENDATION THAT A SUAMRY JUDGMENT' BE GRANTED WITH RESPECT TO THE RELIGIOUSLY HOSTILE WORK ENVIRON-**

MEN CLAIM IN THE SECOND CAUSE ACTION.

The Magistrate characterized the second cause of action as follows:

"His second cause of action alleges that GM tolerated and condoned a religiously hostile work environment, and discriminated against him on the basis of religion in involuntarily transferring him to another department.

(Report at p. I)

1These objections address the specific claims for relief asserted in the amended complaint. Plaintiff Turner believes that the Magistrate also erred with respect to several legal and factual. matters. For example, the Report states that when there is direct evidence of discrimination "The burdeii then shifts to defendants to articulate a legitimate, non-discriminatory reason for transferring plaintiff." (Report at p. 17). To overcome direct evidence of discrimination, the employer's burden is to prove, and not merely articulate, a legitimate, non-discriminatory reason. While we do not agree with this - and other - legal and factual conclusions, Plaintiff Turner is confident that the case will be decided at trial on the basis of the governing law and evidence presented rather than any error or mistake in the Magistrate' 5 Report. Accordingly, the Objections only address the Magistrate' 5 conclusions with respect to the various causes of action that the Magistrate recommended be dismissed.

2The Magistrate recommended that a summary judgment be granted in part with respect to this claim.

The Magistrate concluded that there was a genuine issue of whet]ler Plaintiff Turner' s transfer was motivated by religion.

The Magistrate' s Report states:

"...Brincko came down and told plaintiff hewas being moved to Jim Mass area. Brinckosaid that Mass was of the same color, race and religion as plaintiff, that Mass was also a minister, and there were other Christians in the department...

Plaintiff states that when Brincko told him he was being transferred to Mass' area, he emphasized that Mass was of the same race and religion as plaintiff." (Report at pp. Il, 17).

The Magistrate' s Report concluded:

"Vith reference to religion motivating the transfer, the aforementioned statement of Brincko, in combination with earlier efforts to induce plaintiff to voluntarily move to a new department, shows that there is a genuine issue whether religious bias motivated the transfer." (Report at p. IS).

However, the Magistrate inconsistently concluded that the summary judgment motion should be granted with respect to that portion of the second cause of action which alleges that Plaintiff Turner was subjected to a religiously hostile work environment.

The Magistrate summarily concluded that a summary judgment should be granted on this portion of the second cause of action:"The only incident that was arguably motivated by religious bias was when Porter told plaintiff to think about that' when he was preaching. This is insufficient to create an issue whether Turner was subjected to religiously hostile work environment." (Report at p. I6).

The Recommendation should not be followed.

First, on several occasions, the Defendant sought

to transfer Turner to work under a different supervisor on the basis of religioin, Turner' s Affidavit states:

> I ad earlier been encouraged to transfer to Mass department because he is black and a fellow Baptist Minister." (Turner Affidavit at para. 13).

The Magistrate' s Report noted that General Motors had earlier sought to transfer Plaintiff Turner. (Report at p. 8 and p. IS, note 9). At one point, Turner was pulled off the line to speak with a supervisor who is an ordained Deacon in the Baptist Church.(Turner Affidavit at para. II). This supervisor also urged Turner to transfer to another department (Turner Affidavit at para.

II) The Company' s continued efforts to transfer Turner because of his religion support the claim that Turner was subjected to a religiously hostile work environment.

The Magistrate concluded that: "The only incident that was arguably motivated by religiou5 bias was when Porter told plaintiff to think about that' when he was preaching. (Report at p. 16). The remark was hardly the only evidence of a religiously hostile work environment.

Plaintiff Turner is a Southern Baptist Minister. His strong religious views were well known by Turner's fellow employees. (Estes Dep. at p. 78). Kenneth Click, one of Turner's coworkers in the windshield install area, testified that "I noticed a friction that was there because of his religious aspect versus the other people. (Click Dep. at p. 29) Aware of Turner's religious views, fellow employees repeatedly directed profanity at him and placed Pornographic literature on his desk at work. Rather than one incident, Turner was subjected to repeated harassment because of his strong religiou5 views.

Company workers directed Profanity at Turner. The Magistra~~ notes this in his Report.

> Plaintiff testified that coworker Russ Howard, or Repairman Russ,' called him profane names and made an obscene gesture at him...
> Two coworker glass fitters, named Ron and John, also called Plaintiff obscene names
> Another -0worker...called Plaintiff obscene names.
> Kerish became angry, and began calling Plaintiff a crybaby and useing obscenities...tt
> (Report at pp 7, II).

The obscenities directed at Turner were not limited to coworkers.The Magistrate notes that Turner was referred to as a "motherfucker" by his supervisor.

(Report at p. 9)

The Magistra~~'5 Report states:

> "On another occasion coworkers Estes and Cameron repeatedly threw P0rnography on Plaintiff'5 desk. Plaintiff complained to Brown, who expressed an unwillingne55 to intercede, but said he would look into it. Nonetheless, the activity occurred on otheroccasions... (Report at pp 9, IO).

° Turi,er'5 coworkers ~ePeatedly 5ubject~~ Turner to P0rnographic material.

Plaintiff Turner' s co-workers, fully aware of Plaintiff `5 religiou5 views, 5ubjecte~ Turner to repeated obscenities and Pornography The Magistra~~' s recommendation that the court dismiss the religiously hostile work environment claim should not be followed. General Motors' repeated effort to transfer Turner because of his religion, and the employees subjecting Turner to repeated obscenities and P0rnographic material, Precludes a summary judgment on this issue.

II. THE COURT SHOULD NOT ADOPT THE MAGISTRATE'S RECOMMENDATION THAT A SUMMARY JUDGMENT BE GRANTED WITH RESPECT TO THE FOURTH AND SIN CAUSES OF ACTION ALLEGING THE VIOLATION OF PUBLIC POLICY UNDER OHIO LAW.

The public policy claims set out in the complaint should

not be dismissed for the reasons stated at page 70 of Plaintiff Mark A Turner's Memorandum in Opposition to Defendant General Motors' Memorandum for Summary Judgment. In addition to the authorities there cited, see also Pater v. Health Care and Retirement Corp., 808 F.Supp. 573, 579-580 (S.D. Ohio, 1992).

III. THE COURT SHOULD NOT ADOPT THE MAGISTRATE'S RECOMMENDATION THAT A SUMMARY JUDGMENT BE GGRANTED WITH RESPECt TO THE SEVENTH CAUSE OF ACTION ALLEGING THAT GENERAL MOTORS IS LIABLE FOR FAILING TO PREVENT OR STOP THE RACIAL AND RELIGIOUS HARASSMENT OF TuRnER.

The Magistrate also recommended dismissal of the seventh cause of action.The Report states:"Plaintiff's seventh cause of action alleges that GM is liable for the unlawful and offensive activities of plaintiff's coworke (but does not clearly state the predicat state law tort upon which respondeat superior liability is based). It was Previously noted that plaintiff states no seventh cause of action is based on his Ohio tort law claims.However, all of plaintiff s tort law claims, but for his claim against Ringer, should be dismissed (See III A to E, ~a), thus no predicate exists on which to attach resDondeat superior liability." (Report at p. 26).

The seventh cause of action asserts that Defendant Company is liable for its "failure to control" the harassment by Plaintiff' s co-workers, "when Defendant Companies knew or shou Id have known of thene employees propensities to engage in unlawful and offensive activities." (Amended Complaint at para. 45). This states a claim under Ohio law.

In Kerans v. Porter Paint Co., 61 Ohio St.3d 486 (1991), the Ohio Supreme Court reversed a summary judgment in favor of the employer defendant in a case arising out of sexual harassment. In that case, the employee claimed that she was sexually harassed at work and that her employer took no appropriate action to prevent or stop the wrongful conduct. The Court explained:

> "...an employer may be liable for failing to take appropriate action where that employ knows or has reason to know that one of it employees poses an unreasonable risk of har to other employees." 61 Ohio St.3d at 491.

The Court continued:

> "An employer has a duty to provide its employees with a safe work environment and, thus, may be independently liable for to take corrective action against an employ who poses a threat of harm to fellow employees, even where the employee's actions do not serve or advance the employer's business goals. Whether the employer has acted appropriately in a particular situation is a factual matter to be determined on a case by case basis. However, where an employer knows or has reason to know that one of his employees is sexually harassing employees, he may not sit idly by and do nothing." 61 Ohio St.3d at 493.

In this case, General Motors took no appropriate actions to prevent the abuse of Mark Turner. The Magistrate properly concluded that "There remains an

issue of fact whether GM took reasonable steps to remedy or prevent the racially hostile work environment." (Report at p. 16).

In Baab v. AMR Services Corp, 811 F. Supp. 1246 (N.D.Ohio 1993) this Court observed that in Kerans "The Ohio Supreme Court has recently changed the view of employer's tort liability from previously enunciated vicarious liability principles known to the common law." 811 F.Supp. at 1265. This Court explained:

> "In this court's view Kerans, rather than holding the employer liable for its own negligence, uses that negligence to establish vicarious liability for all torts of the employee predicated upon sexual harassment.In effect, the Kerans Court held that torts of coworkers predicated upon sexual harassment are within the scope of employment if the employer was negligent in not preventing that malfeasance." 811 F.Supp.at 1267.

Under Kerans, General Motors is liable under Ohio law for failing to prevent or stop the racial and religious harassment of Mark Turner. The Magistrate already concluded that an issue of fact exists concerning the appropriateness of the Company's response to Turner's harassment, and the same factual guestion precludes dismissal of the

seventh cause of action asserting General Motors liability under Ohio law.

In urging dismissal of the seventh claim, the Magistrate's Report concluded that if its recommendations are followed there would be no tort liability for which General Motors could be held ~icariously liable. A summary judgment should not be granted with respect to the other state law torts set out in the complaint. Thus, there are torts for which Defendant General Motors can be held vicariously liable. In any event, Defendant General Motors is liable for failing to stop its employees'harassment of Plaintiff Turner under Kerans. The seventh cause of action should not be dismissed.

IV. TIIE COURT SHOULD NOT ADOPT MAGISTRATE'S RECOMMENDATION THAT A SUMMARY ~MENT BE GRANTED WITH RESPECT TO THE NINTH CAUSE OF ACTION, ALLEGING RESPONDEAT SUPERIOR UNDER OHIO LAW.

The Magistrate recommended dismissal of Plaintiff `s respondeat superior claim set out in the ninth cause of action.Defendant Company is not entitled to a summary judgment dismissing this claim.

As explained in the Memorandum, under Ohio law

an employer can be held liable under the doctrine of respondeat superior when it rati fies the conduct of the employee even if the employee is acting outside the normal course of employment.General Motors ratified tlj° 1 ssaul of Mark Turner by employee Jeff Ringer by failing to di sch~rge Ringer for the assault.

Greg Brown, the supervisor of Turner and Ringer,concluded t]iat Ringer should be discharged, as did John Brincko,General Motors' Labor Relations Specialist, and Noel Neil,Supervisor of Labor Relations. (Brown Dep. at p. 41) (Brincko Dep. at p. 20), arid (Neil Dep. at pp 8, 36-38). Despite the recognition tliat the unprovoked assault merited Ringer' s discharge, Ringer was reinstated by the Company. By failing to discharge Ringer, the Company ratified his actions.The Magistrate' s Report states:

> "Moreover, continuing to employ those who have committed intentional torts is not a ratifti cation of the torts. See Dorsev v. Morris, 82 Ohio App. 3d 176 (1982) (summary judgment appropriate; continuing to employ supervisor w]ro threw object at plaintiff did not ratify supervisor' s action, where supervisor was susperided without pay until psychiatric help was sought)." (Report at I,. 26).

In the Dorsey,~ case, the employer did provide

meaningful discipline designed to prevent future misconduct. Here, Ringer received a token su<pension (Ia ter cleared from liis record) for conduct which the Company officials conceded requi.red discharge. Arid, rather than preveIiti ng future abuse of Turiier, the fai Iii re to di scharge Ringer invited continued l)arassment of Turner. T]rere is an issue of fact concerning General Motors' Ii abi Ii ty for Ringer' s assault, and a summary udgment sliou Id not be granted on this cause of action.

V. THE COURT SHOULD NOT ADOPT THE MAGISTRATE'S RECOMMENDATION THAT SUMMARY JUDGEMENT BE GRANTED WITH RESPECT TO THE TENTH CAUSE OF ACTION WHICH ALLEGES INTENTIONAL INFLICTION OF EMOTION DISTRESS UNDER OHIO LAW.

Plaintiff Turner's tenth cause of action alleged intentional infliction of emotional distress. A summary judgment granting that claim is inappropriate for the reasons stated at pages 67-70 of Plaintiff Mark A. Turner's Memorandum in Opposition to Defendant General Motors' Memorandum for Summary Judgment.

The Magistrate acknowledged that there was evidence in the motion papers showing a pattern of

harassment by coworkers and the inadequacy of General Motors' response. The Magistrate notes that "There is genuine issue whether the above noted working environment was unreasonably abusive or offensive" and "There remains an issue of fact whether GM took reasonable steps to remedy or prevent the racially hostile work environment." (Report at pp. I4, 16). The Magistrate recommended dismissal of this cause of action concluding that "The actions and inactions of GM simply did not rise to the level of creating an issue whether there was such extreme and outrageous conduct" that would support an intentional infliction claim. (Report at p. 24). The summary conclusion does not acknowledge the extensive pattern of harassment to which Mark Turner was subjected In the period of several months, Plaintiff Turner was subjected to the following

A male co-employee made sexual advances to Turner. The co-employee was not disciplined.Another o-employe assaulted and injured Turner. The co-employee was given a one-week suspension and his record was soon cleared.

- A dead snake was placed in Turner's

work rea.

- The tires of Turner's automobile were slashed in the General Motors parking lot.

- The lug nuts on the wheels were loosened while the car was parked in the General Motors lot.

- Turner was threatened by white co-employee John Karash.

- Turner was threatened by white co-employee Carl Cononico.

- Turner was threatened by white co-employee Ken Click.

- Turner was subjected to verbal abuse by white employees Earl Thompson, Russ Howard, and several others.

- Graffiti was written in the bathroom which read "Dark Mark sucks."

- Three posters were placed in the work area which read "Mark sucks", "Darky Marky" and "Dark Mark, the All American Loud Mouth."

- Pornographic material was placed in Turner's work station.

- The superintendent called Turner a "mother fucker" and co-employees used profane language in referring to him.

In the Report, at pages 4-11, the Magistrate notes that there is vidence of this pattern of harassment.

The Company stood by and invited and

allowed thisconduct to continue. The Company took no serious action to revent the harassment and it continued. (See Report at pp. 15, 16). Whether, in light of the pactern of harassment, the ompany's respo'ise was sufficiently outrageous to support an ntentional infliction claim is a jury issue. The court should ot conclude on a summary judgment motion that the conduct permitted by General Motors was not extreme and outrageous. See 11Pater v. Health Care and Retirement Corn., SOS F.Supp. 573 (S.D. Ohio, 1992).

The Kerans decision discussed above is also instructivehere. In that case, the plaintiff brought a claim against the mployer for failing to prevent work place sexual harassment. Thethird cause of action alleged intentional infliction of emotional istress. 61 Ohio St.3d at 487. The trial court granted summary udgment dismissing this claim. On appeal, the Supreme Court held that the trial court erred in dismissing the intentional nfliction claim. 61 Ohio St.3d at 494. As in Kerans, this Court hould not dismiss on a

summary judgment the intentional nfliction cause of action.

V. THE COURT SHOULD NOT ADOPT THE MAGISTRATE'S RECOMMENOATION THAT A SUAMARY JUDGMENT BE GRANTED WITH RESPECT TO THE ELEVENTH CAUSE OF ACTION `WHICH ALLEGES AN INTENTIONAL TORT UNDER OHIO LAW.

Under Ohio law, most tort claims by an employee against is employer are pre-empted by the workers' compensation laws. Inblankenship v. Cincinnati Milacron Chemicals. Inc., 69 Ohio St.2d 608 (1982), the Ohio Supreme Court held that an employee could sue is employer for an intentional tort.The eleventh cause of action sets out an intentionaltort claim under Ohio law. Summary judgment should not be granted ith respect to this cause of action for the reasons stated at pages 71 and 72 of Plaintiff Mark A. Turner' s Memorandum in pposition to Defendant General Motors' Memorandum for Summary judgment. The Magistrate disagreed. He recommended dismissal ofthis cause of action.

Plaintiff's eleventh cause of action alleges claim pursuant to Ohio Revised Code Section 4121.80. The Supreme Court of Ohio has found that statute unconstitutional in toto as exceeding and conflicting with the

legislativeathority granted to the General Assembly pursuant to Sections 34 and 35 of Article II of the Ohio Constitution. Brady v. Safety-Kleen Cornoration, 61 Ohio St.3d 624 (1991) (Syllabus, para. 2). Thus defendants are entitled to summary judgment on this claim." (Report at p. 23).

The Magistrate erroneously focused on Ohio Revised Code Section 120.80 and not the intentional tort asserted in the complaint.

After Blankenship, the Ohio General Assembly, seeking to egislate the procedure for suing an employer for an intentional tort, enacted Ohio Revised Code Section 4121.80. In B~, the upreme Court held that Section 4121.80 was unconstitutional. Thedecision, however, did not overrule Blankenshin or preclude anintentional tort claim against an employer. In B~, the Court expressly "reaffirm[ed] our prior holding in Blankenshi~, ~a,and hold that a cause of action brought by an employee alleging intentional tort by the employer in the workplace is not preemptedby [the workers' compensation laws]." 61 Ohio St.3d at 635.

Subsequent to the ~d decision, courts recognized thatan employee can sue his employer for an intentional tort. InD~v. NLO, Inc., 811 F.

Supp. 1271 (S.D. Ohio, 1992), the court observed:

> "...the Ohio Supreme Court has held Ohio Revised Code Section 4121.80 to be unconstitutional. Brady v Safety-Kleen C~, 61 Ohio St.3d 624, 576 N.E.2d 722 (1991). However, the intentional tort exception to workers' compensation law was not abandoned; rather, the Ohio Supreme Court inbrady reaffirmed its decision in Blankenship to allow an employee to sue his employer for an intentional tort. Id. 61 Ohio St.3d at 635, 576 N.E.2d at 722." 811 F. Supp. at 1277, fn. 5.

Clearly, the B~ decision did not foreclose an employee'5 Blankenshi~ claim for an intentional tort against his employer. At the time the complaint was drafted, Ohio Revised Codesection 4121.80 had not been declared unconstitutional.

Consequently, the complaint referred to that section in settingout an intentional tort claim against General Motors.The subsequent holding in B~ precludes reliance on that statute,but does not justify dismissal of the intentional tort claim asserted in the eleventh cause of action. B~, while declaring the statute unconstitutional, held that such claims remain valid under Ohio law. Accordingly, the court should not follow the Magistrate'5 recommendation to dismiss the eleventh

cause of action.

In sum, the Court should not adopt the Magistrat~'5 recommendation that a summary judgment be granted with respect to certain claims set out in the complaint Defendant General Motors Corporatio~'5 Motion for Summary Judgment should be denied in its entirety.

GREEN, HAINES, SGAMBATI, MURPHY &
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